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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM BARSTOW III,

Petitioner,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 724(b) of the Bankruptcy Code authorizes distribution of proceeds of valid tax liens to priority creditors in classes § 507(a)(1)-(7), a process called tax lien subordination. The statute, by its own terms, applies tax lien subordination to any "*lien* that is not avoidable under this title and that secures an allowed claim for a tax . . ." The term "lien" is defined in § 101(37) and includes "statutory lien" and "judicial lien" which are defined in §§ 101(53) and 101(36), respectively, as subsets of the boarder term "lien." The Ninth Circuit held that § 724(b) can apply only to a "statutory lien," thus excluding the IRS's "judicial lien." The court below refused to apply the result mandated by the text (i.e. "lien" including the defined subset "judicial lien"). The text was ignored because the court found that the text would achieve a result in the case that did not represent "sound policy."

The question presented is whether a court can disregard the unambiguous text of a statute, disapprove of the results achieved by the text of the statute, and then apply the court's substituted policy-making to decide how the statute should operate. The question is amplified by the fact that the language at issue in the statute is used throughout the Bankruptcy Code.

STATEMENT PURSUANT TO RULE 29.6

Petitioner is the Chapter 7 Trustee for the bankruptcy estate of MarkAir, Inc. in a bankruptcy case originally filed as a Chapter 11 on April 14, 1995, and which converted to Chapter 7 liquidation on November 8, 1995. MarkAir Inc. was a wholly owned subsidiary of Alaska International Industries (AII), a closely held corporation. Neither AII nor MarkAir was a publicly traded company.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment in this case entered by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Bankruptcy Court's opinion (per Herbert A. Ross) denying the Trustee's request to subordinate the proceeds of the IRS tax lien (Appendix C at 38a-41a) was not published. The District Court's opinion (per James K. Singleton) affirming the Bankruptcy Court (Appendix B at 21a-37a) was not published. The Court of Appeals opinion (per Graber, joined by Fletcher and Alarcon) is published at 308 F.3d 1038 (9th Cir. 2002) (Appendix A at 1a-20a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on October 21, 2002, (Appendix A at 1a) and denied rehearing and rehearing en banc on December 13, 2002 (Appendix D at 42a). Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The controlling provisions in this case are 11 U.S.C. § 724(b) and the statutory definitions of "judicial lien," "lien," and "statutory lien," which are set forth in 11 U.S.C. §§ 101(36), (37) and (53), respectively. These provisions are reprinted at Appendix G, 72a-74a.

STATEMENT OF THE CASE

The facts are simple. The record is brief. The Trustee seeks to recover the proceeds of a judicial lien securing debt owed for federal excise taxes. The proceeds will be used to pay priority claims of consumers who purchased tickets from MarkAir prior to the bankruptcy for flights that MarkAir cancelled after it filed its Chapter 11 petition. These claims are given priority under 11 U.S.C. § 507(a)(6) as consumer deposits not exceeding the sum of $1,950 per creditor.

Pursuant to 11 U.S.C. § 724(b)(2), the § 507(a)(6) ticketholder claims take priority over the IRS' claim to the tax lien proceeds. The tax lien proceeds are used to pay priority creditors with allowed claims in classes §§ 507(a)(1)-(a)(7). The MarkAir bankruptcy estate does not have sufficient assets to pay priority creditors in full, even counting the proceeds of the IRS' judicial lien.[1] As a result, the subordination of the IRS' judicial lien proceeds to priority creditors under § 724(b) will produce no return to the IRS on its secured claim. The outcome of this case determines whether the tax lien proceeds are paid to the priority ticket claimants or to the IRS.

MarkAir filed its first Chapter 11 petition in June of 1992 (MarkAir I, Case no. A92-00476). The MarkAir I case produced a confirmed plan of reorganization. When the debtor was unable to perform on the confirmed Chapter 11 plan, a second Chapter 11 petition was filed on April 14, 1995 (MarkAir II, Case no. A95-00236). The MarkAir II case was converted to Chapter 7 on November 8, 1995. The present claim for tax lien subordination arises in the MarkAir II case.

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1. The IRS' lien is in the amount of about $2.2 million. Total § 507(a)(6) claims are about $3.0 million.

The IRS' judicial lien originated from a court order in MarkAir I which approved a settlement between the IRS and MarkAir. The IRS had claimed a right to setoff against a tax refund owed to MarkAir. The debtor challenged the IRS setoff and sought recovery of the tax refund. The IRS and the debtor resolved the dispute by settlement. Under the terms of the settlement, the IRS was paid about $1.3 million in cash. An additional sum of $1.8 million was deposited with the Clerk of the Bankruptcy Court to secure a debt owed to a senior creditor and to secure debt owed to the IRS for pre-petition excise taxes. The IRS was expressly granted a second position "judicial lien" on the $1.8 million. The agreement was approved by a final order of the Bankruptcy Court entered in the MarkAir I case upon notice to creditors.[2]

On January 16, 1996 (after the ARC senior judicial lien was paid off), the IRS filed a motion in the MarkAir II case to recover the collateral deposit. The IRS sought recovery of the collateral as the holder of a "judicial lien" against the funds. The Trustee opposed on the grounds that the IRS' tax lien was subject to subordination under 11 U.S.C. § 724(b). By order entered July 10, 2000, the Bankruptcy Court denied the Trustee's request and ordered the lien proceeds released to the IRS to pay prepetition excise taxes (which the Trustee later paid to the IRS under a stipulated reservation of rights). Appendix C at 40a. In a companion memorandum decision issued the same day, the court concluded that "Section 724(b) was intended to apply

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2. Appendix A at 3a. The first place judicial lien (in favor of Airline Reporting Corporation) was paid off soon after the MarkAir II case converted to Chapter 7. Most of the basic facts are set out in *In re MarkAir Inc.* (Barstow v. IRS). The Ninth Circuit failed to mention that the debtor in Markair I had challenged the IRS claim to setoff rights. *See* Appellant's Supplemental Excerpts of Record at 107-111 (filed with the Ninth Circuit).

to statutory liens, and not the contractual type of lien involved in this case." Appendix C at 39a.

The Bankruptcy Court's Memorandum Decision refers to the IRS' lien as a "contractual type of lien." *Id.* This would suggest that it meets the definition of a "security interest" under § 101(51), i.e., a "lien created by an agreement." However, the final order in MarkAir I specifies that the IRS has a "judicial lien," and it has been conceded by all that the IRS holds a "judicial lien." Appendix A at 6a-7a. Because § 724(b) uses the broader term "lien" to define tax liens subject to subordination, it necessarily picks up both "judicial liens" and "security interests". *See* discussion, *infra*. Therefore, it makes no difference whether the IRS' lien is deemed to be a judicial lien or a security interest. In either event, it is still a "lien" that is subject to subordination under § 724(b).[3]

The District Court affirmed the Bankruptcy Court in an order and decision entered August 3, 2001. Appendix B at 21a-37a. The Ninth Circuit affirmed the District Court. In its central holding, the Ninth Circuit concluded that the term "tax lien" was ambiguous (Appendix A at 12a) and did not inherently refer to "lien," as defined in § 101(37) of the Bankruptcy Code or the subcategory of "judicial lien" defined in § 101(36). However, the operative text of the statute—appearing seven times in § 724(b)—is not "tax lien," it is "such tax lien." The words "tax lien" never appear in the § 724(b) without the important modifier "such." The word "such" carries the ordinary meaning "aforementioned" or

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3. The IRS, in any event, is bound by the designation of "judicial lien" in the Markair I court order. *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2917-2918, 77 L. Ed. 2d 509 (1983); *United States v. Armour & Co.*, 402 U.S. 673, 681-682, 91 S. Ct. 1752, 1757-1758 (1971).

"previously referred to." The word "such" acts as a reference to the definitional antecedent at the beginning of § 724(b): "*lien* that is not avoidable under this title and that secures an allowed claim for a tax."

The Ninth Circuit found ambiguity where none existed in the text—viz, in the term "tax lien" rather than in the actual term used, "such tax lien." Armed with this "ambiguity," the court then consulted extrinsic sources. It found that neither the legislative history nor the text "provide a definitive answer. . . ." Appendix A at 15a-16a. The court ultimately relied upon its own determination of what is correct "policy." Appendix A at 18a-19a. The court declared that if the IRS' judicial lien were subordinated, it would discourage the IRS from entering into compromises with taxpayers. *Id.* For policy reasons, therefore, the term "such tax lien" could not refer to the antecedent, "lien . . . that secures an allowed claim for tax." The statute could not be read literally to apply to any "*lien* . . . that secures an allowed claim for tax" as "lien" is defined in § 101(37) of the Bankruptcy Code. It could only apply to any "*statutory lien* . . . that secures an allowed claim for a tax." The text was rejected in favor of the court's own view on how the statute should operate.[4]

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4. The Ninth Circuit cited the Markair I court ordered "protections" by which the order was to "remain in full force and effect" in any subsequent bankruptcy case filed by Markair. Appendix A at 3a-4a. However, the circuit court did not hold that the Markair I order modified the rights of unknown future priority creditors in any subsequent Markair bankruptcy case. That would have been a procedural impossibility and a clear violation of due process. Instead, the Ninth Circuit held that § 724(b) applied only to "statutory liens . . . that secure an allowed claim for a tax." The decision turned exclusively on the scope of the statute and not on a theory that the Markair I order could modify the rights of priority unsecured creditors in a future Markair bankruptcy case.

REASONS FOR GRANTING THE WRIT

This petition for certiorari should be granted for at least three different reasons. First, the Ninth Circuit has refused to apply the unambiguous text of a statute on the grounds that applying the text of the statute represents bad policy. Because the Ninth Circuit disapproves of the result achieved by the text, it substitutes a result that it considers to be "better." The effect is a judicial usurpation of enumerated legislative powers delegated exclusively to Congress under Article I § 8 of the Constitution, (viz, the "power to lay and collect taxes" and "establish . . . uniform laws" of bankruptcy).

Second, there is a split of the circuits on the question of whether the text of § 724(b) must give way to judicially crafted notions of policy. The Ninth Circuit has concluded that a literal application of § 724(b) cannot apply if the text produces results that are judicially determined to be inappropriate. The Sixth Circuit, by contrast, has insisted that policy decisions on tax lien subordination are manifested in the text of § 724(b), which must be applied as written.

Third, the Ninth Circuit has failed to apply, indeed ignored, defined terms and standard usage that appear throughout the Bankruptcy Code. The term "such tax lien," which appears seven times in § 724(b), is a reference back to the definitional antecedent "*lien* . . . that secures an allowed claim for tax." The use of the word "such" to modify a noun and refer to an antecedent (i.e., such [noun] = definitional antecedent) occurs *hundreds of times* in Title 11. Appendix E at 44a-69a. The Ninth Circuit, by ignoring the word "such" in § 724(b), debases this usage everywhere else it appears in

Title 11. If "such" does not carry its normal meaning in § 724(b), then there is no reason why it should carry its normal meaning, or be binding on federal courts, in any of the hundreds of other provisions of Title 11 where the word "such" is used to refer to a definitional antecedent.[5]

I. THE CIRCUIT COURT UNLAWFULLY EXERCISED ARTICLE I POWERS BY PREEMPTING THE STATUTORY TEXT AND SUBSTITUTING ITS OWN POLICY DECISION.

The Ninth Circuit attempts to circumvent the unambiguous text of the statute by holding that the operative term for defining the scope of tax lien subordination is "tax lien." Appendix A at 7a-9a and 12a-20a. The court looks to sources outside the statute to establish an ordinary language meaning for "tax lien" and justify limiting the scope of the statute to the narrower term "statutory lien . . . that secures an allowed claim for a tax." The exercise is pointless since the operative term in § 724(b) is "such tax lien" rather than "tax lien." The Ninth Circuit's finding of ambiguity is based on a false premise—ignoring the word "such" as it appears in the statute and ignoring its effect—the reference to the definitional antecedent, "*lien* . . . that secures an allowed claim for a tax."

This false premise of textual ambiguity then leads to the Ninth Circuit's discussion of extrinsic aids. It is well recognized that extrinsic aids cannot be used when the meaning of the statute is already clear. The unambiguous text

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5. The same analysis applies to the Ninth Circuit's failure to apply the defined term "lien" in accordance with the all encompassing statutory definition in § 101(37) which incorporates the subcategory "judicial lien" as defined in § 101(36).

controls.[6] Since the statute is unambiguous, extrinsic sources cannot be used to alter the mandate of the text. The Ninth Circuit's use of extrinsic sources is contrary to the text and defeats Congressional will.

A. Unambiguous Text

The text of § 724(b) applies tax lien subordination to any "*lien*"—"statutory lien" or "judicial lien" (or "security interest")—"that secures an allowed claim for a tax." The text cannot support any other conclusion:

> § 724(b) Property in which the estate has an interest and that is subject to a *lien* that is not avoidable under this title and *that secures an allowed claim for a tax*, or proceeds of such property, shall be distributed—
>
> (1) first, to any holder of an allowed claim secured by a *lien* on such property that is not avoidable under this title and that is senior to *such tax lien*;

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6. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149. 117 L. Ed. 2d 391 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Barnhill v. Johnson*, 503 U.S. 393, 401, 112 S. Ct. 1386, 1391, 118 L. Ed. 2d 39 (1992) ("appeals to statutory history are well taken only to resolve statutory ambiguity"); *Patterson v. Shumate*, 504 U.S. 753, 760, 112 S. Ct. 2242, 2248, 119 L. Ed. 2d 519 (1992) ("Given the clarity of the statutory text," the proponent of an alternative reading "bears an exceptionally heavy burden.").

(2) second, to any holder of a claim of a kind specified in sections 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by *such tax lien*;

(3) third, to the holder of *such tax lien*, to any extent that such holder's allowed tax claim that is secured by *such tax lien* exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a *lien* on such property that is not avoidable under this title and that is junior to *such tax lien*;

(5) fifth, to the holder of *such tax lien*, to the extent that such holder's allowed claim secured by *such tax lien* is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

. . .

The text of § 724(b) applies tax lien subordination to any "*lien* . . . that secures an allowed claim for a tax." The Ninth Circuit held that § 724(b) can only apply to a "*statutory lien* . . . that secures an allowed claim for a tax." The text of the statute conclusively shows reversible error by the court below.

The term "lien" is defined by 11 U.S.C. § 101(37) as a "charge against or interest in property to secure payment of a debt or performance of an obligation . . ." The defined term

"lien" includes all defined subcategories of "lien"— "statutory lien," "judicial lien," and "security interest":

> Paragraph 28 [now paragraph 37 of § 101] defines "lien." The definition is new and is very broad.... In general, the concept of lien is divided into three kinds of liens: judicial liens, security interests, and statutory liens. Those three categories are mutually exclusive and are exhaustive except for certain common law liens.[7]

The terms judicial lien, security interest, and statutory lien are each defined, respectively, in § 101(36), (51), and (53), by the use of the broader defined term "lien." A "judicial lien" under § 101(36) is a "*lien* obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." A "statutory lien" under § 101(53) is a "*lien* arising solely by force of a statute on specified circumstances or conditions." A "security interest" under § 101(51) is a "*lien* created by an agreement." By statutory definition, a "*lien* . . . that secures an allowed claim for a tax" in § 724(b) includes the subcategory "judicial lien."

Congress uses the term "lien" in a provision of Title 11— § 724(b)—and has also defined that term in Title 11— § 101(37). It necessarily follows that the term "lien" in § 724(b) coincides with the Bankruptcy Code's definition of the term "lien" in § 101(37): "When a statute includes an explicit definition, we must follow that definition . . ."[8]

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7. Senate Report No. 95-969 at 25, reprinted in U.S. Code Cong. & Admin. News at 5811 (1978).

8. *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S. Ct. 2597, 2615, 147 L. Ed. 2d 743 (2000); *see also Fox v. Standard Oil Company of*

(Cont'd)

The repeated use of a term in an integrated Code (such as Title 11) doubly requires that the codified definition be applied in accordance with its defined meaning.[9]

A "statutory lien" is a "lien"—but a "lien" is far more than just a "statutory lien." Because Congress used the term "lien" in the opening text of § 724(b), a "tax lien" is not just a "statutory lien" that secures a tax claim. It is any "lien" that secures a tax claim, including any "judicial lien." The judicial lien obtained by the IRS is a subcategory of "lien" as defined in § 101(37). The IRS' judicial lien is a "lien . . . that secures an allowed claim for a tax" and is subject to tax lien subordination under § 724(b).

The text of § 724(b) conclusively shows that Congress meant the broader term "lien" rather than the narrower term "statutory lien." Congress knew the difference between these terms since Congress codified definitions for "lien" and "statutory lien" in 11 U.S.C. §§ 101(37) and (53). Congress

(Cont'd)

New Jersey, 294 U.S. 87, 96, 55 S. Ct. 333, 337, 79 L. Ed. 780 (1935) (Where Justice Cardozo observed: "There would be little use in such a glossary if we were free in spite of it to choose a meaning for ourselves.").

9. *CIR v. Keystone Consolidated Industries*, 508 U.S. 152, 159, 113 S. Ct. 2006, 2011, 124 L. Ed. 2d 71 (1993) (The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." The Court in *CIR* emphasized that "the Code [IRC] must be given as great an internal symmetry and consistency as its words permit" (*id.*)—a conclusion equally applicable to the Bankruptcy Code.); *see also Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 660, 126 L. Ed. 2d 615 (1994) ("A term appearing several places in a statutory text is generally read the same way each time it appears.").

actually uses the term "statutory lien" to establish subordination of *nontax* liens in § 724(d). Subsection (d) applies to "*non-tax statutory liens* that have a priority determined in the same manner as the priority of tax liens under Internal Revenue Code Section 6323."[10] For these *nontax* liens, lien subordination is restricted exclusively to "*statutory liens*." The subordination contemplated by subsection (d) does not extend to judicial liens or security interests.

Congress uses the defined term "lien," rather than "statutory lien" to establish the scope of tax lien subordination in § 724(b): Congress uses the narrower defined term "statutory lien" to limit the scope of subordination for nontax liens in § 724(d). The distinction has to be considered intentional:

> It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another . . .[11]

Different terms have different meanings. The use of different language creates the inference that Congress meant different things and that Congress does not use different language in

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10. *Collier on Bankruptcy* § 724.05 at 724-18 (15th ed. 2001) (emphasis added).

11. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S. Ct. 1757, 1761, 128 L. Ed. 2d 556 (1994), quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S. Ct. 1588, 1593, 128 L. Ed. 2d 302 (1994); *Bates v. United States*, 522 U.S. 23, 29-30, 118 S. Ct. 285, 290, 139 L. Ed. 2d 215 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

different provisions to accomplish the same result. "Lien" in § 724(b) means "lien" as defined in § 101(37). It cannot mean "statutory lien."

This conclusion is further demonstrated by the use of the word "lien" in §§ 724(b)(1) and (b)(4). These subparagraphs regulate distributions on account of valid nontax liens which are not affected by tax lien subordination. In §§ 724(b)(1) and (b)(4), the broader term "lien" is used to refer to "any holder of an allowed claim secured by a *lien* on such property . . ." The term "lien" in §§ 724(b)(1) and (b)(4) cannot be limited solely to "statutory lien." It has to include judicial liens and security interests, precisely because these types of nontax liens are not affected by tax lien subordination:

> The result of these provisions [§§ 724(b)(1) and (b)(4)] are to leave senior and junior [non-tax] lienors . . . undisturbed.[12]

Paragraphs (1) and (4) require distributions to nontax creditors who hold "security interests" such as mortgages.[13] Distributions on account of "liens" under §§ 724(b)(1) and (b)(4) also include "judicial liens" which secure payment of

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12. House Report No. 95-595 at 382, *reprinted in* 5 U.S. Code Cong. & Admin. News at 6338. *In re Soltan*, 234 B.R. 260, 274 (Bk. N.Y. 1999) "When Section 724(b) is applied properly, no senior or junior (non-tax) lienholders should be disturbed . . ."; *Collier on Bankruptcy* § 724.03[3][d] at 724-12-13 ("The effect of Section 724(b) is to adjust distributions as between the holder of the tax lien and the trustee without affecting other lienholders").

13. *See, e.g., In re Dowco Petroleum, Inc.*, 137 B.R. 207, 213 (Bk. Tex. 1992); *In re K.C. Machine & Tool Co.*, 816 F.2d 238, 243 (6th Cir. 1987).

nontax claims.[14] Since the broader term "lien" has to apply in §§ 724(b)(1) and (b)(4) to secured non-tax claims, it must also apply in the opening text of § 724(b) to secured tax claims.

The statute is decidedly *not* ambiguous. It applies to any "*lien* . . . that secures an allowed claim for a tax." If this statute is ambiguous, then no statute is free of ambiguity; the text of every Congressional enactment becomes nothing more than a suggestion; courts become free to go beyond the text of the statute and consult any extrinsic sources they wish; they may even rely on their own wisdom as to what the court—not Congress—believes to be "sound policy." No court has that authority. No court can "rewrite the statute based on [its own] notions of appropriate policy."[15]

The method used by the Ninth Circuit to find ambiguity was itself inherently flawed. The court singled out as ambiguous the term "tax lien," a term that does not exist in the text of § 724(b). The actual term used is "such tax lien." An "ambiguity" can exist here only by ignoring the modifier "such" in each of the seven instances that "tax lien" (or rather "such tax lien") appears in § 724(b). The Ninth Circuit could not ignore the word "such" in "such tax lien." No court has authority to edit out the words of a statute. In construing a statute, courts "are obligated to give effect, if possible, to every word Congress used."[16] It is a "cardinal principle of

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14. *See, e.g., In Re Soltan*, 234 B.R. 277-280; *In Re Hydrochem Processing*, 190 B.R. 129 (Bk. Ga. 1995).

15. *Bankamerica Corp. v. United States*, 462 U.S. 122, 140, 103 S. Ct. 2266, 2276, 76 L. Ed. 2d 456 (1983).

16. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 2331, 60 L. Ed. 2d 931 (1979).

statutory construction" that "no clause, sentence or word shall be superfluous, void or insignificant."[17]

The term "such tax lien" is defined in § 724(b) by the antecedent, "*lien* . . . that secures an allowed claim for a tax." Codified definitions are not limited to definition sections. "Statutory definitions may appear either in separate sections or in the body of substantive provisions."[18] The statutory definition controls "even if it varies from that term's ordinary meaning."[19] "Such tax lien" means "lien" as defined in § 101(37) and not some definition found outside the statute.

B. Extrinsic Sources

The text of the statute "must ordinarily be regarded as conclusive . . . unless exceptional circumstances dictate otherwise."[20] Anyone attempting to contradict an unambiguous statutory text "bears an exceptionally heavy

17. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001); *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 520, 99 L. Ed. 615 (1955).

18. Sutherland Statutory Construction, Vol. 2A § 47:07 at 227 (Sands ed. 2000).

19. *Stenberg v. Carhart*, 530 U.S. at 942, 120 S. Ct. at 2615. *See also Meese v. Keene*, 481 U.S. 465, 484, 107 S. Ct. 1862, 1873, 95 L. Ed. 2d 415 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.").

20. *Burlington Northern Railway Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461, 107 S. Ct. 1855, 1860, 95 L. Ed. 2d 404 (1987).

burden."[21] Since § 724(b) is unambiguous, the court below could not rely on extrinsic sources to find ambiguity. Extrinsic sources are used only to resolve ambiguity.[22] They cannot be used to fabricate an ambiguity that does not exist in the text. "[W]hen the words of a statute are unambiguous, then . . . judicial inquiry is complete."[23]

The Ninth Circuit cites, as an extrinsic source, § 67c(3) of the Chandler Act, the predecessor of § 724(b).[24] Section 67c(3) applied tax lien subordination to "every tax lien against personal property not accompanied by possession." By contrast, § 724(b) applies tax lien subordination to any "lien that is not avoidable under this title and that secures an allowed claim for a tax." The Ninth Circuit assumes there is continuity intended between § 67c(3) and § 724(b). The text of the two statutes conclusively proves otherwise.[25] The Ninth

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21. *Patterson v. Shumate*, 504 U.S. at 760, 112 S. Ct. at 2248; *Union Bank v. Wolas*, 502 U.S. 151, 155-156, 112 S. Ct. 527, 530, 116 L. Ed. 2d 514 (1991) ("Given the clarity of the statutory text, respondent's burden of persuading us . . . is exceptionally heavy").

22. *Barnhill v. Johnson*, 503 U.S. at 401, 112 S. Ct. at 1391 ("appeals to statutory history are well taken only to resolve statutory ambiguity").

23. *Connecticut National Bank v. Germain*, 503 U.S. at 254, 112 S. Ct. at 1149.

24. PL 89-495; 80 Stat. 268 § 4. The text of § 67c(3) is set out at Appendix G, 75a.

25. Among other things, § 724(b) expands the scope of tax lien subordination to include liens against both real and personal property. It drops the limitation that the lien be "accompanied by possession"

(Cont'd)

Circuit's obsession with the term "tax lien" fixates on a relic of the former statute. The term "tax lien" in § 67c(3) was supplanted in § 724(b) by the term "lien"—a term that was first defined by § 101 of the 1978 Code. What controls is the text of § 724(b) and not the prior, superseded statute.

The Ninth Circuit cites a statement in the legislative history of § 724(b) that tax lien subordination under the 1978 Code applies "without substantial modification in result."[26] These words do not say what type of liens are subject to tax lien subordination, but rather what happens to those liens that are subject to subordination. The quoted excerpt cannot demonstrate continuity in the scope of tax lien subordination—the change in the text of the statute conclusively demonstrates the intent to expand the scope. The reference cited is about the effect which tax lien subordination has on liens that are already determined to be subject to the statute. The result of tax lien subordination—its effect on subordinated liens—remains the same. The lien proceeds are distributed to priority creditors. This snippet in the legislative history (which the court below misread) cannot override the text of the statute.[27]

(Cont'd)

and, of course, § 724(b) uses the defined term "lien" to apply tax lien subordinate to any "lien . . . that secures an allowed claim for a tax." The term "lien" was newly defined by the 1978 Bankruptcy Code. *See* n.7 *supra* and accompanying text.

26. Appendix A at 14a.

27. *Patterson v. Shumate*, 504 U.S. at 762, 112 S. Ct. at 2248 ("meager excerpts" from legislative history cannot control "in derogation of the statute's clear language."); *see also* nn.6 and 21, *supra*.

The court below was even wrong in concluding that "tax lien" in common parlance can only mean "statutory lien" and cannot include "judicial lien." Tax liens can and do include judicial liens that secure tax claims. *See* Appendix F at 70a-71a (citing numerous examples of judicial liens that secure tax claims). The extrinsic sources cited by the Ninth Circuit cannot overcome the "heavy burden" of persuasion imposed by an unambiguous text.[28]

C. Text v. Policy

The Ninth Circuit disagreed with the result achieved by the text of the statute. It concluded that the result mandated by the text did not represent sound policy. The Ninth Circuit was concerned that if the statute were applied literally to the IRS lien, then the IRS would be loath to enter into settlements in the future, thereby producing policy results that the Ninth Circuit considered inappropriate. Appendix A at 19a. These are not matters within the province of the IRS or the courts. These are policy decisions for Congress to make. Congress decides what is to be done with the fruits of IRS' collection efforts, not the IRS, and certainly not the Ninth Circuit.

> Congress has self-evident reasons for favoring wage claimants [507(a)(3) and (4)], farmers and fishermen [507(a)(5)], consumers [507(a)(6)], and spouses and dependent children [507(a)(7)]—even if, in the aggregate, it means some decrease in revenue for the Federal Treasury. Congress decides what happens to the proceeds of federal tax liens—not the

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28. *Patterson v. Shumate*, 504 U.S. at 760, 112 S. Ct. 2248 *and see* n.6, *supra*. In any event, the statutory definition necessarily controls regardless of what the ordinary language meaning of "tax lien" may be. *See* nn.8 and 19.

IRS or the Ninth Circuit. The IRS and the Ninth Circuit can no more complain about subordination of federal tax liens than they can complain about Congressional appropriations.

Section 724(b) does not defeat or invalidate the settlement between the IRS and MarkAir which created the judicial lien. Congress, through § 724(b), is directing the distribution of proceeds of valid, enforceable liens that secure tax claims. The text of § 724(b) mandates that any "lien that is not avoidable under this title . . ." is subject to tax lien subordination. The lien in question must be immune from the avoiding powers (11 U.S.C. §§ 544-553 and 724(a)) and from objection under non-bankruptcy law (11 U.S.C. §§ 502(b)(1) or 506(a)). Section 724(b) applies to any and all *valid* tax liens, regardless of how they arose.

Congress decided that, in Chapter 7 bankruptcy cases, proceeds of valid tax liens must be used to pay priority creditors. Congress unquestionably has the authority to establish distributional priorities in bankruptcy. Congress can also enhance the meaning and value of priority status. It has done so here under 724(b) by requiring distribution, to priority creditors, of the proceeds of any valid, and otherwise fully enforceable, "lien . . . that secures an allowed claim for a tax."

An unambiguous statute must be given its full textual effect. The words of the statute are the medium through which Congress exercises its lawful powers. Courts must be faithful to the text and give the words their full meaning. There can be no fabrication of ambiguity and no substitution of judicial wisdom to replace the mandate evidenced by the words of the statute. Section 724(b) applies tax lien subordination to any "*lien* . . . that secures an allowed claim for a tax."

The Ninth Circuit cannot limit the statute's scope to any "*statutory lien* . . . that secures an allowed claim for a tax." The statute necessarily applies to any "lien," including the "judicial lien" held by the IRS. In light of the very serious intrusion on Article I powers effected by the Ninth Circuit in its decision, certiorari should be granted in the interest of discouraging such usurpation in the future.

D. Split of the Circuits

The Ninth Circuit has disregarded the statutory text and refused to apply § 724(b) in accordance with its unambiguous meaning. Any valid "*lien* . . . that secures an allowed claim for a tax" is subject to subordination. The Ninth Circuit changed this to any valid "*statutory lien* . . . that secures an allowed claim for a tax." The court concluded that a literal application of the text constituted "bad policy." The text did not control. The Ninth Circuit's policy notions did.

This is not the first time that a circuit court has been asked to override the text of § 724(b) and apply a judicially crafted "policy" to replace the result mandated by the text. The Sixth Circuit, when presented with policy arguments about § 724(b), refused to invoke "policy" to override the statute:

> Contrary to [tax lien creditor's] urging, we decline to pass judgment on the wisdom of § 724(b). Congress passed that legislation for reasons sufficient unto itself.[29]

The lien creditor's grievance in *K.C. Machine* was that cash proceeds of a tax lien supposedly could not be distributed to

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29. *K.C. Machine & Tool*, 816 F.2d at 245.

priority creditors when the property, prior to bankruptcy sale, was fully encumbered by liens junior to the tax lien. There was no textual basis for the taxing authority's argument. The Sixth Circuit chose to adhere to the text rather than rewrite the statute to fit its own ideas about "policy."

There is considerable divergence between the application of § 724(b) by the Ninth Circuit and the Sixth Circuit. The Ninth Circuit ignores the text and applies its own policy notions on how tax lien subordination should work. The Sixth Court leaves policy decisions to Congress and applies the text of the statute. The Sixth Circuit acted within the confines of judicial authority. The Ninth Circuit did not.

II. THE DECISION BELOW DISAVOWS TEXTUAL USAGE THAT APPEARS HUNDREDS OF TIMES IN THE BANKRUPTCY CODE

The term "such tax lien" appears seven times in § 724(b) and is present in each of the first five numbered paragraphs of the statute. "Such tax lien" is shorthand for liens that are subject to tax lien subordination. It is central to defining the scope of tax lien subordination. The word "such" carries the ordinary language meaning "aforementioned" or "previously referred to." [30] It serves to refer the reader back to an antecedent. "Such tax lien" in § 724(b) refers to the antecedent, "lien that is not avoidable under this title and that secures an allowed claim for a tax." The text follows a standard formula in which the word "such" modifies the word "tax lien" to refer to a definitional antecedent. This formula—

30. *See, e.g., Gatlin Oil Company, Inc. v. United States*, 169 F.3d 207, 211 (4th Cir. 1999) (" 'such' represents the object as already particularized . . . referring to the last antecedent"—quoting Black's Law Dictionary).

such [noun] = definitional antecedent—is not limited solely to § 724(b). This same usage appears hundreds of times throughout the Bankruptcy Code. There are a minimum of 150 examples of "such usage" in the first three chapters of Title 11 alone. Examples are set forth in the Appendix E at 44a-69a.[31]

The Ninth Circuit found it "logical" that the modifier "such" refers the reader back to a definitional antecedent. Appendix A at 11a. The circuit court nevertheless refused to follow the logic of the text. The court was unable to justify its decision from the text. The only textual basis offered for the court's conclusion is a reference to the isolated words in § 724(b)(3) —"to any extent that *such holder's allowed tax claim* that is secured by *such tax lien* exceeds any amount distributed under paragraph 2 of this subsection." The circuit court believed it was redundant to use "tax " in this clause in both "allowed tax claim" and "such tax lien." This usage in § 724(b)(3) somehow disproved that "such tax lien" could refer to the definitional antecedent, "lien . . . that secures an allowed claim for a tax." Appendix A at 11a.

The court's thought process is difficult to follow—but easy to disprove. The use in § 724(b)(3) of the word "such" in "such holder's" carries its ordinary language reference to an antecedent—"the holder of such tax lien" which appears earlier in the text of § 724(b)(3). The circuit court never

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31. In just the first three Chapters of Title 11 this usage (such [noun] = definitional antecedent) appears one or more times in each of the following sections: 103, 104, 106, 108, 110, 301, 302, 303, 304, 328, 329, 330, 331, 342, 345, 346, 348, 349, 361, 362, 363, 365, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 522, 523, 524, 525, 541, 542, 543, 545, 546, 547, 548, 549, 557, 558 and 559. *See* Appendix E at 44a-69a.

suggested otherwise. If "such" carries its ordinary meaning in modifying "holder's," then "such" has to carry the same meaning in "such tax lien"—especially since "such" appears multiple times *in the same clause*:

> there is a presumption that a given term is used to mean the same thing throughout a statute . . . a presumption surely at its most vigorous when a term is repeated within a given sentence . . .[32]

It is impossible for the word "such" to carry one meaning (or none) in 724(b)(3) as a modifier of "tax lien" and a different meaning as a modifier of "holder's."

The phrases "allowed tax claim" and "such tax lien" in § 724(b)(3) are not at odds with each other. They employ two different techniques for referring to a textual antecedent. The words "allowed tax claim" are simply a paraphrase of the words "an allowed claim for a tax" that appear in the definitional antecedent in the opening text of § 724(b) ("lien . . . that secures an allowed claim for a tax."). The effect of the paraphrase is the same as using "such" to modify "tax lien." Both techniques refer to an antecedent. The fact that an antecedent can be invoked by a paraphrase, and not just by the word "such," does not mean that the word "such" loses its meaning in the statute. On the contrary, the paraphrase ("allowed tax claim") reinforces the fact that an antecedent provides the definition for the shorthand terms that are used in the numbered paragraphs—an antecedent that is invoked either by paraphrase or by the use of the adjective "such."

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32. *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 555, 130 L. Ed. 2d 462 (1994).

It is bad enough that the court below so badly mangled ordinary usage in this situation. What makes the decision even worse is that the form of usage in question—such [noun] = definitional antecedent—appears *hundreds of times* in the Bankruptcy Code. Appendix E at 44a-69a. Its ubiquity in Title 11 provides even further justification for concluding that the statute must be read exactly the way it is written. If, as the Ninth Circuit has assumed, the usage of "such" can be discounted or ignored in § 724(b), then the same textual usage is debased everywhere it appears in Title 11.

The word "such" in "such text lien" must have the same meaning each of the seven times it appears in § 724(b) (i.e., "such tax lien" = "*lien* . . . that secures an allowed claim for a tax"). Indeed, the word "such" must be applied in the same way wherever it appears in Title 11—since "reading the word differently for each code section to which it applies would open Pandora's jar."[33] It is important that the Ninth Circuit's assault on the text of the Bankruptcy Code, and on this ubiquitous textual usage, be stopped in its tracks.[34]

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33. *Ratzlaf v. United States*, 510 U.S. at 143, 141 S. Ct. at 660. *See also* n.9, *supra*.

34. The same analysis applies to the Ninth Circuit's refusal to honor the statutory definition of "lien" in the words "*lien* . . . that secures an allowed claim for a tax. The statute cannot be read to apply only to a "statutory lien . . . that secures an allowed claim for a tax." The defined term "lien" has to be applied in accordance with its codified definition—§ 101(37)—in § 724(b) (including subparagraphs (b)(1) and (b)(4)) and in every other provision of Title 11 where the term "lien" is used.

CONCLUSION

The words of a statute are the means by which Congress expresses its authority. Without the words, there is no authority. When the circuit court removed the words "such" (and "lien") from § 724(b), it also removed the authority by which the statute was promulgated. Congress became mute, its authority superseded by a judicial oracle that presumed to be the exclusive voice for the applicable law.

For the reasons stated in this brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUBMITTED AUGUST 6, 2002 AND FILED OCTOBER 21, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35819
D.C. No. CV-00-00206-JKS

In re: BANKRUPTCY ESTATE OF MARKAIR, INC.,

Debtor.

WILLIAM BARSTOW, III,

Appellant,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Appellee.

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, Chief Judge, Presiding

Argued and Submitted
August 6, 2002—Anchorage, Alaska

Filed October 21, 2002

Appendix A

Before: Betty B. Fletcher, Arthur L. Alarcón, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

OPINION

GRABER, Circuit Judge:

William Barstow, Trustee of the bankruptcy estate of MarkAir, Inc. (MarkAir), seeks to subordinate the proceeds of a judicial lien securing taxes owed to the United States Internal Revenue Service (IRS). The Trustee relies on § 724(b) of the Bankruptcy Code, 11 U.S.C. § 724(b), which subordinates tax liens to the claims of certain priority unsecured creditors. The bankruptcy court denied the Trustee's request to subordinate, and the district court affirmed. The Trustee appeals and we, too, affirm. We hold that the term "tax lien" in § 724(b) means a statutory tax lien and that the term does not embrace a judicial lien securing an underlying tax obligation.

FACTUAL AND PROCEDURAL HISTORY

In June of 1992, MarkAir filed for bankruptcy under Chapter 11. When the company filed its petition, it had an outstanding liability for air transportation excise taxes. However, the IRS had not yet filed a Notice of Federal Tax Lien with respect to this liability and, accordingly, had no statutory tax lien.

Thereafter, MarkAir concluded that it had overpaid certain taxes and requested a refund. The IRS asserted a right to offset the amount of the overpayment against the outstanding tax liabilities of MarkAir and its parent corporation.

MarkAir moved for an order in the bankruptcy court allowing it to use the overpayment to secure its obligations to the Airline Reporting Corporation (ARC), a ticket clearinghouse used by travel agents. ARC had threatened to stop clearing MarkAir's tickets—which essentially would have shut down the airline's business—unless MarkAir posted a letter of credit in the amount of $1.8 million.

To avoid an immediate shutdown of MarkAir's operations, the IRS and MarkAir compromised their positions and entered into an agreement with ARC. The IRS agreed to forego its offset claim and to allow a portion of the overpayment, $1.8 million, to be deposited with the bankruptcy court as the ARC collateral. MarkAir agreed that the balance of the overpayment, approximately $1.3 million, would be paid immediately to the IRS. Further, it agreed that any amount of the collateral remaining upon termination of the agreement with ARC would be paid to the IRS.

Under the agreement, ARC was given a "first judicial lien position" against the collateral, and the IRS was given a "second place judicial lien position." The bankruptcy court approved the compromise between the IRS and MarkAir and ordered that the "protections" afforded to the IRS under the court's order "shall remain in full force and effect in the event

that [MarkAir's] case is converted to another chapter under the . . . Code (or reconverted to Chapter 11) or any subsequent case is filed by or against [MarkAir] under the Code."

MarkAir failed to meet its obligations under the confirmed bankruptcy plan and, in April 1995, filed a second Chapter 11 petition. MarkAir soon ceased operations and, in November 1995, the case was converted to one under Chapter 7. ARC then released its claim against the collateral, and the IRS moved for distribution of the collateral pursuant to the parties' agreement. The Trustee opposed the request. Pursuant to 11 U.S.C. § 724(b), he sought to subordinate the IRS's lien so that he could pay administrative expenses and the claims of other priority creditors.

The bankruptcy court concluded that subordination under § 724(b) was intended to apply to "statutory" tax liens, but not to the "contractual type of lien involved in this case." The court first held that the text of the statute was sufficiently ambiguous to permit the court to explore legislative history for guidance as to Congress' intent. Based on its analysis of the statute's legislative history and text, the court then held that the subordination of tax liens in § 724(b) applies only to statutory liens. Accordingly, the IRS was entitled to recover the full amount of its collateral, namely, the $1.8 million deposit and accrued interest.

The Trustee appealed, arguing that because the IRS's "judicial lien . . . secures an allowed claim for tax, it is a 'lien' within the meaning of § 724(b) and is subject to tax lien subordination." The district court rejected the Trustee's

argu-ment and affirmed for the reasons stated in the bankruptcy court's decision. The Trustee filed a timely notice of appeal.

STANDARDS OF REVIEW

We review de novo the district court's decision on an appeal from a bankruptcy court. *Neilson v. Chang (In re First T.D. & Inv., Inc.)*, 253 F.3d 520, 526 (9th Cir. 2001). We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Id.* We review de novo questions of statutory construction. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

DISCUSSION

A. *Text of § 724(b)*

The parties' dispute centers around § 724(b) of the Bankruptcy Code, a provision that partially subordinates tax liens to the claims of a number of other parties, including some priority unsecured claimants. That subsection provides:

> Property in which the estate has an interest and that is *subject to a lien* that is not avoidable under this title and *that secures an allowed claim for a tax*, or proceeds of such property, shall be distributed—
>
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not

avoidable under this title and that is senior to *such tax lien*;

(2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by *such tax lien*;

(3) third, to the holder of *such tax lien*, to any extent that such holder's allowed tax claim that is secured by *such tax lien* exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to *such tax lien*;

(5) fifth, to the holder of *such tax lien*, to the extent that such holder's allowed claim secured by *such tax lien* is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

11 U.S.C. § 724(b) (emphasis added).

The parties agree that the IRS's lien on the ARC collateral is a "judicial lien," which is defined in the Bankruptcy Code

as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). We also agree with this characterization because the IRS's lien arose as a result of a legal proceeding.

However, the Trustee and the IRS advance markedly different views as to the significance of this characterization. The IRS argues that § 724(b) applies only to statutory tax liens and, therefore, that the statute does not require subordination of the IRS's claim. *Id.* § 101(53). By contrast, the Trustee argues that the statute applies to any kind of lien that secures an allowed claim for tax. Accordingly, he claims that the IRS's lien is subordinated to unsecured priority claimants pursuant to § 724(b)(2).

The Trustee and the IRS assert that their respective interpretations of § 724(b) are mandated by the "plain meaning" of the statute's text. *See FDIC v. County of Orange (In re County of Orange)*, 262 F.3d 1014, 1018 (9th Cir. 2001) ("In construing a statute, we first consider its text." (citation and internal quotation marks omitted)). Neither party is correct. Although the text of the statute provides some support for the Trustee's interpretation, Congress' frequent use of the term "tax lien" in § 724(b) interjects ambiguity.

1. *Widely Acknowledged Meaning of "Tax Lien"*

The term "tax lien" appears seven times in § 724(b). The statute does not define it. When a term is undefined, we usually apply its common meaning. *See Romine v. Diversified Collection Servs., Inc.*, 155 F.3d.1142, 1145 (9th Cir. 1998) ("In the absence of statutory definition,

a statutory term will be accorded its ordinary meaning."). Further, "[w]ords with a fixed legal or judicially settled meaning, where the context so requires, must be presumed to have been used in that sense." *Huffman v. Commissioner*, 978 F.2d 1139, 1145 (9th Cir. 1992). The IRS argues that the phrase "tax lien" is a term of art with a widely accepted meaning in tax and bankruptcy law—a statutory tax lien—and that Congress must be deemed to be familiar with the established meaning.

The term "tax lien" does, in general, refer to statutory tax liens. The weight of the relevant case law so holds. *See, e.g., In re Khoe*, 255 B.R. 581, 588 (Bankr. E.D. Cal. 2000) ("A federal tax lien is neither a judicial lien nor a non-possessory, nonpurchase money security interest."); *Filipovits v. IRS (In re Filipovits)*, No. 94-5-8134-SD, 1995 WL 724520, at *1 (Bankr. D. Md. Sept. 20, 1995) ("A tax lien is a statutory lien; and it is not a judicial lien."); *Robinson v. United States (In re Carolina Resort Motels, Inc.)*, 51 B.R. 447, 450 (Bankr. D.S.C. 1985) ("[T]he legislative history clearly indicates that tax liens are statutory liens.").

Similarly, a number of prominent secondary authorities note that the typical statutory lien is the tax lien. *See, e.g.*, 2 Collier on Bankruptcy ¶ 101.53, at 101-48 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2002) ("Good examples of statutory liens are tax liens. . . ."); 1 Robert E. Ginsberg & Robert D. Martin, Ginsberg and Martin on Bankruptcy § 6.02[D][2], at 6-30 (4th ed. 2001) ("Typical statutory liens are mechanics' liens and tax liens."). Black's Law Dictionary 1459 (6th ed.1990) defines a "tax lien" generally as:

> A statutory lien, existing in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land or (in some jurisdictions) for all the taxes due from the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

Finally, the Bankruptcy Deskbook notes that "[a] federal tax lien is not a judicial lien." 1 William C. Hillman & Margaret M. Crouch, Practising Law Institute: Bankruptcy Deskbook § 1:4.2, at 1-11 n.28 (3d ed. 2001).

If Congress intended to adopt the common meaning of "tax lien" when it enacted § 724(b), then, "tax lien" would refer only to statutory liens, not judicial liens.

2. *Context and Structure of the Bankruptcy Code*

The Trustee responds by arguing that it is irrelevant that the term "tax lien" commonly refers to a statutory tax lien; the only relevant question is how *Congress* intended the term to be used in § 724(b). The Trustee is correct in stating that, when Congress defines a term, courts are to apply that definition in interpreting the meaning of the statute. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); *United States v. Yochum (In re Yochum)*, 89 F.3d 661, 666 (9th Cir. 1996) ("[I]n statutes that contain statutory

definition sections, it is commonly understood that such definitions establish meaning wherever the terms appear in the same Act.").

As noted, however, Congress failed to define "tax lien" in the statute, even though § 101 of the Bankruptcy Code defines a number of related terms. For example, § 101 defines a "lien" generally as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). A "statutory lien" is defined as a

> lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Id. § 101(53). A "judicial lien" means a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* § 101(36). Finally, a "security interest" is defined as a "lien created by an agreement." *Id.* § 101(51). These definitions do not tell us directly what Congress meant when it used the term "tax lien."

The Trustee acknowledges that the term "tax lien" appears seven times in § 724(b) but points out that in each instance "tax lien" is preceded by the word "such." He asserts that "such" amounts to a reference throughout § 724(b) to the complete antecedent in subsection (b), namely, "a lien that is not avoidable under this title and that secures an

allowed claim for a tax." 11 U.S.C. § 724(b). The foregoing phrase refers only to a "lien," which can include either a statutory lien or a judicial lien. Thus, he argues, Congress intended the phrase "such tax lien" to be defined by reference to subsection (b) and § 101(37) and thereby intended to supplant the traditional meaning of "tax lien" in § 724(b).

Although the Trustee's parsing of the section is logical, the word "such" will not bear so much weight in this context. In 11 U.S.C. § 724(b)(3), for example, the third payout is to the holder of the tax lien, "to any extent that such holder's *allowed tax claim that is secured by such tax lien* exceeds any amount distributed under paragraph (2) of this subsection." (Emphasis added.) If the Trustee's interpretation were correct, the emphasized phrase "such tax lien" instead would read simply "a lien"; otherwise the repetition of "tax" is redundant. *See United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985) ("A statute should be construed so as to avoid making any word superfluous."). In the context of this subsection, at least, Congress appears to have used the term "tax lien" to mean a subset of the larger term "lien."

Additionally, § 724(d) of the Bankruptcy Code states: "A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien." 11 U.S.C. § 724(d). In other words, statutory liens whose priority is established in the same manner as the priority of a tax lien under § 6323 are treated as if they are tax liens. In subsection (d), the phrase "tax lien" at the end of the sentence refers back to "a tax lien under section 6323

of the Internal Revenue Code of 1986"—a statutory tax lien. Ordinarily, "such" refers to an antecedent phrase. In § 724, however, only subsection (d) explains fully what a "tax lien" might mean. Although it is unusual grammatically, Congress may have used "such tax lien" in § 724(b) to refer to the kind of "tax lien" identified fully in § 724(d).

Because neither party's reading of "tax lien" is obviously correct, the statute is ambiguous. When a statute's text is ambiguous, we look to legislative history as an aid to discerning congressional intent. *See Merkel v. Commissioner*, 192 F.3d 844, 848 (9th Cir. 1999) ("[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation." (citation and internal quotation marks omitted)); *N.W. Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("Where a statute is ambiguous, we may look to legislative history to ascertain its purpose."). We turn next, then, to legislative history.

B. *Legislative History of § 724(b)*

Unfortunately, the legislative history of § 724(b) is not entirely clear. On balance, however, it supports the IRS's interpretation of the statute.

Section § 724(b) was added to the Bankruptcy Code in 1978. The relevant portion of its predecessor provision, § 67c of the Chandler Act, provided:

> *Every tax lien* on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and

> (2) of subdivision (a) of section104 of this Title. Where *such a tax lien* is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the *tax lien* attaches, less the actual cost of that sale, of an amount not in excess of the *tax lien*, to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this Title. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this Title and the amount of the *tax lien*, is to be paid to the holder of the *tax lien*.

11 U.S.C. § 107(c)(3) (codifying § 67c) (superseded by § 724(b) in 1978) (emphasis added).

The legislative history of § 67c of the Chandler Act demonstrates that, when Congress used the term "tax lien" in the statute, it intended the term to mean only statutory liens. The report of the Senate Committee on the Judiciary stated that "the effect of section 67c is limited to statutory liens and does not include consensual liens." S. Rep. No. 89-1159 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2456, 2460. Further, Congress noted that "new section 67c establishes more effective standards for the treatment of statutory liens." *Id.* at 2462. As the leading bankruptcy treatise explained the legislative history of the Act, "[n]onstatutory tax liens[were] not affected by § 67c." 4 Collier on Bank-

ruptcy ¶ 67.27, at 377 (Lawrence P. King ed., 14th ed.1978). Thus, the provision of the statute that § 724(b) replaced had *no* subordinating effect on judicial liens or on contractual liens ("security agreements" under the current code), even when those types of liens secured an allowed claim for tax.

The committee reports produced in the drafting and enactment of § 724(b) suggest that this result is unchanged under the new code. As the report of the House Committee on the Judiciary explains, § 724(b) "governs tax liens. It is derived from section 67c(3) of the Bankruptcy Act, *without substantial modification in result.*" H.R.Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6338 (emphasis added). Similarly, the report states: "Tax liens are also included in the definition of *statutory lien.*" *Id.* at 6271 (emphasis added). The report also explains that "[t]he House amendment modifies present law by requiring the subordination of tax liens." *Id.* at 6501. These passages in the legislative history show that Congress intended the term "tax lien" in § 724(b), like in § 67c(3) of the Chandler Act, to refer only to statutory liens.

While the Trustee correctly counters that the legislative history of § 724(b) demonstrates that the reach of that section is broader than that of its predecessor, § 67c, nothing in that history suggests that the particular ways in which § 724(b) is broader than § 67c have anything to do with the distinction between statutory and other types of tax liens. Rather, § 724(b) appears simply to expand the *types of property* to which a subordinated tax lien may be attached:

> The House amendment modifies present law by requiring the subordination of tax liens on both

> real and personal property to the payment of claims having a priority. This means that assets are to be distributed from the debtor's estate to pay higher priority claims before the tax claims are paid, even though the tax claims are properly secured. Under present law and the Senate amendment only tax liens on personal property, but not on real property, are subordinated to the payment of claims having a priority above the priority for tax claims.

H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6570. As Collier notes:

> Section 724(b) is considerably broader, however, than was section 67c(3). Section 67c(3) applied only to tax liens on personal property unaccompanied by a change of possession. It did not apply to tax liens on real property nor did it apply to tax liens on personal property where the lienholder obtained possession of the property prior to bankruptcy. In contrast, section 724(b) applies to all types of property and is not dependent on possession.

6 Collier on Bankruptcy ¶ 724LH[2], at 724-19 to -20.

In summary, the better reading of the legislative history is that Congress intended to confine the application of § 724(b) to statutory liens. Nonetheless, because the text, context, and legislative history do not provide a definitive

answer, we next consider cases interpreting § 724(b) and the public policy considerations underlying Congress' enactment of the statute.

C. *Cases*

The Trustee and the IRS cite a number of cases in support of their respective interpretations. However, the parties' citations and our own research have not uncovered any decision addressing the same issue that we face.

The Trustee argues that two cases discussing the validity of cash collateral orders support his position. *In re Bino's Inc.*, 182 B.R. 784 (Bankr. N.D. Ill. 1995); *In re Life Imaging Corp.*, 131 B.R. 174 (Bankr. D. Colo. 1991). Although those cases contain isolated passages favoring the Trustee, neither is entirely on point because the IRS in both cases already had a *statutory* lien on the property in question, which was converted to a judicial lien by agreement of the parties. The courts in those cases thus focused on the fact that, by compromising the tax claim, the trustee was "bargain[ing] away the tax lien subordination provisions of § 724(b)" and attempting to "override the subordination provisions of § 724(b)." *Bino's*, 182 B.R. at 787-88.

In the present case, however, the IRS did not have a statutory lien on the ARC collateral but, instead, had actual possession of the funds. Therefore, in the absence of the parties' agreement, there would have been *no* lien to subordinate pursuant to § 724(b). Accordingly, the parties cannot be said to have been "bargaining away" or "overriding" § 724(b), and *Life Imaging* and *Bino's* are inapposite.

Moreover, those two decisions do not represent the only approach adopted by courts in cash collateral order cases. For example, in *In re Buzzworm, Inc.*, 178 B.R. 503, 505 (Bankr. D. Colo. 1994), the court concluded that enforcement of a cash collateral agreement need not violate the statute: "[A] tax lien creditor, under the right circumstances, may avoid, by agreement, the distribution scheme under Section 724(b). . . ." The court's rejection of the approach adopted in *Bino's* and *Life Imaging* is well reasoned and relies on the text of the statute, its legislative history, and public policy considerations. *Id.* at 509-12. Thus, contrary to the Trustee's claims, the cash collateral cases do not necessarily support his interpretation of § 724(b).

Other cases discussing § 724(b) are of little help in determining whether the statute applies to judicial liens. Accordingly, we move to our final consideration: the policies underlying Congress' enactment of the statute and the policy consequences of adopting each party's construction of § 724(b).

D. *Policy*

When one considers Congress' primary purpose in enacting § 724(b), the IRS's construction might, at first glance, seem illogical. As both parties properly concede, an important purpose of § 724(b) is to offer some protection to certain priority claimants—such as spouses, dependent children, farmers, fishers, consumers, and employees—from tax claims that otherwise would consume most or all of the bankruptcy estate. *See Gouveia v. IRS (In re Quality*

Health Care), 215 B.R. 543, 557 (Bankr. N.D. Ind. 1997); *see also N. Slope Borough v. Barstow*, No. 01-35892, __ F.3d __, __ (9th Cir. 2002) (decided this date) (op. at 16) (holding that the language of § 724(b) unambiguously establishes partial subordination of tax liens to the interests of priority unsecured creditors). If the purpose of the statute is truly to protect priority claimants and to ensure that they are paid before the taxing authorities are, it seems implausible that Congress intended to distinguish among different types of liens.

On the other hand, when viewed from another perspective, the IRS's construction of the statute is entirely reasonable. Congress enacted § 67c of the Chandler Act in response to similar concerns about protection of administrative and wage claimants yet, as discussed above, Congress clearly chose to limit the application of subordination to only statutory claims. In balancing the competing interests of tax lienholders and priority unsecured claimants, Congress easily could have concluded that the fairest course of action was to subordinate some, but not all, liens securing claims for tax.

Further, the policy consequences of adopting the IRS's view are more consonant with the overall bankruptcy scheme. The IRS had MarkAir's tax refund in its possession, and the IRS's potential right to retain the refund did not arise pursuant to any type of lien. That is, under either party's view of the statute, the IRS's claim to the refund was not originally subject to subordination under § 724(b). Only when the refund was offered to MarkAir for use in the company's reorganization did the IRS's claim become secured with a

judicial lien. In that circumstance, the IRS was acting in its capacity as an "ordinary" creditor, not in its capacity as a tax collector.

Under the Trustee's interpretation, the IRS's claim to the refund was transformed into a subordinated claim simply because the IRS entered into an agreement with the company for release of the refund for use in reorganization. That reading of the law would discourage taxing authorities from releasing any funds that otherwise could be used to resurrect a failing company. This concern was a significant factor motivating the *Buzzworm* court to hold that cash collateral orders may modify the operation of § 724(b):

> [T]here are strong practical and policy reasons for enforcing such Chapter 11 agreements [protecting tax claimants from the operation of § 724(b)] against a Chapter 7 trustee. Enforcing such agreements will encourage lien creditors to better cooperate with a reorganizing debtor and reduce pressure, early in the case, to litigate and, perhaps, prematurely "pull the plug" on a debtor.

Buzzworm, 178 B.R. at 509.

We think that Congress intended to encourage the kind of behavior that the IRS exhibited in this case; it left money in the estate when it was not required to do so, in the hope of assisting MarkAir to survive. That behavior furthers the overall purpose of the Bankruptcy Code.

E. *Conclusion*

The text of § 724(b) is ambiguous. Its context, structure, legislative history, and purpose convince us that Congress intended the phrase "tax lien" to refer to statutory tax liens and not to judicial liens securing the payment of taxes. Accordingly, we affirm the decision of the bankruptcy court and the district court.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED AND FILED AUGUST 3, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. A00-0206 CV (JKS)

WILLIAM BARSTOW, III, TRUSTEE FOR THE BANKRUPTCY ESTATE OF MARKAIR, INC.,

Appellant,

vs.

INTERNAL REVENUE SERVICE,

Appellee.

ORDER

INTRODUCTION

Presently before the Court is an appeal filed by Appellant William Barstow, III, Chapter 7 Trustee, for the bankruptcy estate of MarkAir, Inc. ("MarkAir" or "Debtor") of the United States Bankruptcy Court for the District of Alaska's decision that tax lien subordination under 11 U.S.C. § 724(b) is limited exclusively to tax claims which are secured by a statutory lien. *See* Docket No. 17 (Appeal); 20 (Opp'n); 24 (Reply).

Appendix B

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts are not in dispute. *See* Docket Nos. 17; 20. In June of 1992, MarkAir filed for bankruptcy under Chapter 11. *See* Docket No. 17 at 4.

> At the time Debtor filed its petition, it had an outstanding air transportation excise tax liability for the first and second quarters of 1992. (The [Internal Revenue Service ("Service")] did not file a Notice of Federal Tax Lien with respect to these amounts against the Debtor.) Subsequently, the debtor concluded that it was entitled to an overpayment. The Service asserted a right to offset the anticipated overpayment against the outstanding tax liabilities of the Debtor and [Alaska International Industries, Inc.]. The Debtor then moved the Bankruptcy Court for an order allowing it [to] use any overpayment to secure its obligations to the Airline Reporting Corporation (hereinafter "ARC"). This was necessary because, at the time the Debtor determined that it was due an overpayment, ARC, a ticket clearinghouse used by travel agents, demanded that the Debtor post a letter of credit in the amount of $1,800,000.00. If the Debtor failed to provide such a bond, ARC indicated that it would no longer clear tickets and, in essence, shut down the Debtor's operations.
>
> In order to avoid an immediate shut down of the Debtor's operations, the Service and the Debtor compromised their positions and entered into an agreement with ARC (hereinafter the

"Collateral Agreement"). . . . The Service agreed to forgo its offset claim, as well as the statutory 90-day period to review the application for tentative refund. A portion of the overpayment, $1,800,000.00, would be deposited with the registry of the Bankruptcy Court as the ARC collateral (hereinafter the "ARC Collateral"), and the balance of the overpayment, approximately $1,300,000.00, would be paid to the Service. The amount of the ARC Collateral remaining upon termination of the Collateral Agreement, if any, then would be paid over [to] the Service.

As reflected in the Collateral Agreement, ARC was given a "first judicial lien position" against the ARC Collateral and the Service was granted a "second place judicial lien position" against the ARC Collateral. . . . By Order Authorizing MarkAir to Establish a Collateral Deposit Pursuant to 11 U.S.C. § 364(d), dated April 12, 1993 (hereinafter the "Collateral Order)," . . . the Bankruptcy Court approved the compromise between the Debtor and the Service as set forth in the Collateral Agreement. In its Order Confirming Fifth Amended Joint Plan of Reorganization of MarkAir and MarkAir Express, as Modified, dated June 9, 1993 (hereinafter "Confirmation Order"), the Bankruptcy Court ordered . . . that the "protections" afforded the Service under the Collateral Order "shall remain in full force and effect in the event that the Debtor's case is converted to another chapter under the . . . Code (or reconverted to Chapter 11)

> or any subsequent case is filed by or against the Debtor under the Code." . . . The Bankruptcy Court further ordered that the "payments heretofore or hereafter made by, or for the benefit of the Debtor pursuant to the stipulations and agreements referenced in the Collateral Order shall be absolute, unconditional, and non-refundable, and shall not, under any conditions, by subject to avoidance or disgorgement to any person or entity, including any successor in interest to, or bankruptcy trustee of the Debtor."
>
> The Debtor failed to meet its obligations under the confirmed plan, and in April 1995, the Debtor filed a second Chapter 11 petition. Subsequently, the Debtor ceased operations, and in November 1995, the case was converted to one under Chapter 7. Thereafter, ARC released its claim against the ARC Collateral, and the United States moved for distribution of the ARC Collateral to the Service pursuant to the terms of the Collateral Agreement. . . . [T]he Trustee opposed the request and sought to subordinate the Service's lien to pay administrative expenses and other priority creditors under § 724(b).

Docket No. 20 at 4-7 (footnotes omitted).

The Bankruptcy Court

> conclud[ed] that § 724(b) was intended to apply to statutory tax liens, and not the contractual type of lien involved in this case. The meaning

> of the statute—that is the intent of Congress—is sufficiently ambiguous to permit reference to legislative history. That history shows that, in enacting § 724(b), Congress modified and expanded upon § 67c of the Bankruptcy Act, but did not intend to expand the coverage of the section to reach beyond statutory tax liens. . . .
>
> The IRS is entitled to recover its collateral, the $1.8 million deposit and accrued interest.

See Docket No. 17, Ex. 11 at 2. MarkAir disagreed with the Bankruptcy Court's decision and its interpretation and application of 11 U.S.C. § 724(b) and appealed it to this Court. *See* Docket No. 17 (Appeal); 20 (Opp'n); 24 (Reply).[1] MarkAir argues that "the IRS' judicial lien, which secures an allowed claim for a tax, is a 'lien' within the meaning of § 724(b) and is subject to tax lien subordination." *See* Docket No. 17 at 36. The Service argues that § 724(b) only applies to tax liens, which is a type of statutory lien and thus the contractual and judicial lien at issue here is not subject to subordination under § 724(b). *See* Docket No. 20 at 7-13.

DISCUSSION

I. Standard of Review

The Court must "review the bankruptcy court's conclusions of law de novo and must uphold its findings of

1. As this is an appeal from a final decision of the United States Bankruptcy Court for the District of Alaska, the Court has jurisdiction under 28 U.S.C. § 158(a)(1). *See* 28 U.S.C. § 158(a)(1).

fact unless they are clearly erroneous." *See In re Video Depot, Ltd.*, 127 F.3d 1195, 1197 (9th Cir. 1997). If there are no disputed factual issues, "[t]he bankruptcy court's grant of summary judgment is also reviewed de novo." *See In re Betacom of Phoenix, Inc.*, 240 F.3d 823, 828 (9th Cir. 2001).

II. Statutory and Judicial Liens

The Bankruptcy Code defines some of the terms at issue in the case at bar. " '[L]ien' means charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37).

> '[S]tatutory lien' means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Id. § 101(53).[2] " '[J]udicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* § 101(36).

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2. "A statutory lien is a lien that arises strictly by operation of law without either the consent of the debtor or the involvement of a court in its creation. Typical statutory liens are mechanics' liens and tax liens." 1 *Robert E. Ginsberg & Robert D. Martin, Ginsberg & Martin On Bankruptcy*, § 6.02[D][2] (4th ed.2001) (footnote omitted).

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Various courts have noted that a tax lien is a type of statutory lien. *See In re Filipovits*, 1995 WL 724520, at *1 (Bankr. D. Md. Sept. 20, 1995) ("A tax lien is a statutory lien; and it is not a judicial lien."); *In re Carolina Resort Motels, Inc.*, 51 B.R. 447, 450 (Bankr. D.S.C. 1985) ("[A] tax lien is a statutory lien."); *In re E.W. Shields, Inc.*, 34 B.R. 44, 45 (Bankr. D. Or. 1983) ("[T]ax liens are statutory liens."). Moreover, leading treatises on bankruptcy law have agreed that a tax lien is a statutory lien. For example, *Collier on Bankruptcy* states that

> [t]he essence of the definition in section 101(53) is the need, or lack of need, for an agreement or judgment to create the lien. If the lien arises by force of statute, without any prior consent between the parties or judicial action, it will be deemed a statutory lien. . . . If the creation of the lien is dependent upon an agreement, it is a security interest even though there is a statute which may govern many aspects of the lien. The fact that a statute describes the characteristics and effects of a lien does not by itself make the lien a statutory lien. . . . Section 101(53) defines statutory liens to specifically exclude both judicial liens and security interest, thereby alleviating much confusion. The judicial lien is a creature of statute and is not dependent upon an agreement between the parties. More significantly, however, a judicial lien arises only by virtue of judicial proceedings in the absence of which there would not be such a lien. The statutory lien by definition arises without any judicial proceeding.

Appendix B

> Good examples of statutory liens are . . . tax liens[.]

See 2 *Collier On Bankruptcy*, ¶ 101.53 (Lawrence P. King ed., 15th ed. 2001) (footnotes omitted). Similarly, *Ginsberg and Martin on Bankruptcy* state that

> [t]ypical statutory liens are mechanics' liens and tax liens. Such liens survive against exempt property to the extent they are valid under nonbankruptcy law and stand up against the trustee's avoiding powers. In effect, the Bankruptcy Code is making a policy decision in favor of the . . . tax collector over the debtor's need for sufficient property to make a fresh start.

See Ginsberg & Martin, *supra* § 6.02[D][2] (footnotes omitted). Blacks Law Dictionary defines a tax lien as

> [a] statutory lien, existing in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land or (in some jurisdictions) for all the taxes, due the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

See Blacks Law Dictionary 1459 (6th ed. 1990).

It would then appear that the lien described in 11 U.S.C. § 724(b) is a statutory lien to the extent that it is a tax lien. *See* 11 U.S.C. § 724(b). As the parties agree that the Service

holds a contractual and judicial lien as opposed to a statutory lien, *see* Docket No. 17, Ex. 3, 11 U.S.C. § 724(b) is not applicable to the case at bar unless the type of lien described in 11 U.S.C. § 724(b) is something other than a tax lien. *See* Docket Nos. 17 at 5; 20 at 2-13. It is thus necessary for the Court to determine whether the lien at issue in 11 U.S.C. § 724(b) is a tax lien.

III. Statutory Construction

A. Plain Language

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Thus, when interpreting a bankruptcy statute, courts must first look to the plain language of the statute. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

"[I]n statutes that contain statutory definition sections, it is commonly understood that such definitions establish

meaning wherever the terms appear in the same Act." *In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996). "When . . . the meaning of a word is clearly explained in a statute, courts are not at liberty to look beyond the statutory definition." *United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998). "In the absence of statutory definition, a statutory term will be accorded its ordinary meaning." *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1145 (9th Cir. 1998). Moreover,

> [p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme. When we look to the plain language of a statute in order to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole.

See United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999) (internal quotations and citations omitted). "[A] word is known by the company it keeps (the doctrine of *noscitur a sociis)*. This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (internal quotations omitted).[3] However, "if the statute

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3. The rule guided our earlier interpretation of the word "security" under the 1934 Act. The 1934 Act defines the term "security" to mean, *inter alia*, "any note." We concluded, nevertheless that, in context the phrase

(Cont'd)

is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation." *See Merkel v. Comm'r Internal Revenue*, 192 F.3d 844, 848 (9th Cir. 1999) (internal quotations omitted).

The statute at issue here, 11 U.S.C. § 724, provides that

> (a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.
>
> (b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—
>
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
>
> (2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of

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(Cont'd)

> 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the background of what Congress was attempting to accomplish in enacting the Securities Acts.

Gustafson, 513 U.S. at 575 (internal quotation omitted).

this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph(2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

(c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under

> subsection (b) of this section the same as if such lien were a tax lien.

See 11 U.S.C. § 724.

It would appear that 11 U.S.C. § 724(b) applies to property that is subject to a tax lien. Subsection (b) provides for distribution of the property subject to the lien, *see id.* § 724(b)(1)-(6), and the subsections refer to the amount secured by the tax lien. *See id.* Additionally, analyzing each section, *see, e.g.*, § 724(d), and construing the statute as whole, reveals that the lien described in § 724(b) is a statutory tax lien. Thus, a reasonable interpretation of the plain language reveals that the 11 U.S.C. § 724(b) applies to tax liens. Various courts and scholars agree. *See Pearlstein v. United States Small Bus. Admin.*, 719 F.2d 1169, 1175 (D.C. Cir. 1983) ("Section 724(b) subordinates tax liens to certain prior claims");[4] *In re Southeast R.R. Contractors*,

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4. The court in *Pearlstein v. United States Small Business Administration* stated that

> [Section 724(b)] sets forth in detail the consequences of this subordination on the order of distribution to all claimants against property in an estate (or its proceeds) that is subject to a tax lien.
>
> . . . .
>
> These provisions specify the effect of the subordination of a tax lien on the various other types of secured and unsecured claims. They do not, however, attempt

(Cont'd)

Inc., 235 B.R. 619, 624 n.4 (Bankr. E.D. Tenn. 1996) ("11 U.S.C. § 724(b) provides that property of the estate subject to certain tax liens may be used to pay the holders of priority claims set out in 11 U.S.C. § 507(a)(1)-(7)."); *In re A.G. Van Metre, Jr., Inc.*, 155 B.R. 118, 122 (Bankr. E.D. Va. 1993) ("The result of these provisions is to subordinate payment of statutory tax liens to the payment of administrative expenses (up to the amount of the tax liens) while leaving senior consensual lienholders, junior consensual lienholders and holders of unsecured claims undisturbed."); 6 *Collier*, ¶ 724.03, at 724-8 ("Section 724(b) provides a mechanism for subordinating tax liens to the payment of certain priority claims."); Judith Greenstone Miller, *Response to Government (Non-Tax) Working Group Amended Proposal # 2*, 102 Com. L.J. 205, 205 (1997) ("Section 724(b) changes the order of distribution when the personal and real property of the estate is subject to a valid federal, state or local tax lien which arose prior to the commencement of the case.)." Nonetheless, to the extent that § 724(b) is ambiguous because of the possible construction that the language "such tax lien" in the subsections refers to a type of lien other than a traditional statutory tax lien and could encompass other types of liens, it is instructive to refer to the legislative history.

(Cont'd)

> otherwise to change the order of distribution that would exist among those nontax claims apart from the subordination of the tax lien.

Pearlstein, 719 F.2d at 1175.

Appendix B

B. Legislative History

The Supreme Court has stated that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal quotations omitted). Analyzing the committee reports pertaining to 11 U.S.C. § 724(b) reveals that Congress intended that section to apply to tax liens. For example, the Committee Report from the Judiciary Committee in the House of Representatives stated that

> [s]ubsection (b) governs tax liens. It is derived from section 67c(3)[5] of the Bankruptcy Act, without substantial modification in result. It subordinates tax liens to administrative expense and wage claims, and solves certain circuity of liens problems that arise in connection with the subordination. The order of distribution of property subject to a tax lien is as follows: First, to holders of liens senior to the tax lien; second, to administrative expenses, wage claims, and consumer creditors

5. "Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title." 11 U.S.C. § 107(c)(3) (1970) (codifying 67c(3) of the Bankruptcy Act). "[N]onstatutory tax liens [were] not affected by § 67c." 4 *Collier on Bankruptcy*, ¶ 67.27, at 377. "[T]he effect of section 67c is limited to statutory liens and does not include consensual liens." S. Rep. No. 89-1159 (1966).

> that are granted priority, but only to the extent of the amount of the allowed tax claim secured by the lien. In other words, the priority claimants step into the shoes of the tax collector. Third, to the tax claimant, to the extent that priority claimants did not use up his entire claim. Fourth, to junior lien holders. Fifth, to the tax collector to the extent that he was not paid under paragraph (3). Finally, any remaining property goes to the estate. The result of these provisions are to leave senior and junior lienors and holders of unsecured claims undisturbed. If there are any liens that are equal in status to the tax lien, they share pari passu with the tax lien under the distribution provisions of this subsection.

See H.R. Rep. No. 95-595, at 382 (1977), *reprinted in* 1978 U.S.C.C.A.N. at 6338; *see also Pearlstein*, 719 F.2d at 1171-75; 6 *Collier On Bankruptcy*, ¶ 724.LH[2] at 724-19.[6] Thus,

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6. Section 724(b) was derived from section 67c(3) of the Bankruptcy Act.

> It continues the longstanding policy under the Act of subordinating tax lien claims to certain priority claims. Section 724(b) is considerably broader, however, than was section 67c(3). Section 67c(3) applied only to tax liens on personal property unaccompanied by a change of possession. It did not apply to tax liens on real property nor did it apply to tax liens on personal property where the lien holder obtained possession of the property prior to bankruptcy. In contrast, section 724(b) applies to all types of property and is not dependent on possession.

(Cont'd)

the legislative history of 11 U.S.C. § 724(b) makes it evident that 11 U.S.C. § 724(b) specifically applies to statutory tax liens.

CONCLUSION

Because 11 U.S.C. § 724(b) pertains to statutory tax liens and not to the contractual and judicial lien in the case at bar, the Court shall affirm the Bankruptcy Court's decision.

IT IS THEREFORE ORDERED:

The appeal at **Docket No. 17** is **DENIED**. The Bankruptcy Court's decision is **AFFIRMED**.

Dated at Anchorage, Alaska, this 3 day of August 2001.

s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

(Cont'd)

> Section 67c(3) subordinated payment of the tax lien claims to priority claims arising under clauses (1) and (2) of section 64 of the Act. These two clauses covered administrative expenses and wage priorities. It then directed payment of excess proceeds to the holder of the subordinated tax lien. The statute was not clear as to the status of junior liens on the property with the result that a circuity of liens problem often arose. This was corrected under section 724(b) which specifically provides for the treatment of junior liens vis-a-vis the holder of the displaced tax lien.

6 *Collier On Bankruptcy*, ¶ 724.LH[2] (footnote omitted).

APPENDIX C — MEMORANDUM DECISION AND ORDER REGARDING $1.8 MILLION IRS DEPOSIT OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA DATED AND FILED JULY 10, 2000

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA

JUDGE HERB ROSS

Case No. A95-00236-HAR
Chapter 7

In re

MARKAIR, INC., an Alaska corporation,

Debtor(s).

MEMORANDUM DECISION REGARDING $1.8 MILLION IRS DEPOSIT

The question is whether the trustee in this case (MarkAir 2) can avoid the IRS security interest in a deposit made in MarkAir's earlier bankruptcy (MarkAir 1)[1] to secure payment of taxes to the IRS. The extensive briefing in this matter is outlined in the Appendix to this *Memorandum*.

I hold that 11 USC § 724(b) cannot be invoked by the MarkAir 2 trustee to avoid a security interest granted to the IRS to secure its taxes. The legal analysis leading to this

1. *In re MarkAir, Inc.*; *In re MarkAir Exxpress, Inc.*, A92-00476-HAR and A92-00477-HAR.

holding is set out in the brief of Ron Goss, Esq., on behalf of Neil Bergt, entitled *Response Memorandum of Neil G. Bergt and Alaska International Industries, Inc. in Support of IRS Motion for Release of Registry Funds*,[2] I adopt Mr. Goss' argument.

Summarized, I conclude that § 724(b) was intended to apply to statutory tax liens, and not the contractual type of lien involved in this case. The meaning of the statute — that is, the intent of Congress — is sufficiently ambiguous to permit reference to legislative history. That history shows that, in enacting § 724(b), Congress modified and expanded upon § 67c of the Bankruptcy Act, but did not intend to expand the coverage of the section to reach beyond statutory tax liens.

This decision makes it unnecessary to address additional arguments raised by Bergt and the IRS.

The IRS is entitled to recover its collateral, the $1.8 million deposit and accrued interest. A separate, final order will be entered.

DATED: July 10, 2000

s/ Herbert A. Ross
HERBERT A. ROSS
U.S. Bankruptcy Judge

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2. Docket Entry 2581, filed October 16, 1996, at pages 1-39 (to line 13), and pages 44-45 (Points 1-9).

Appendix C

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA

JUDGE HERB ROSS

Case No. A95-00236-HAR
Chapter 7

In re

MARKAIR, INC., an Alaska corporation,

Debtor(s).

ORDER REGARDING $1.8 MILLION IRS DEPOSIT

For the reasons stated in the *Memorandum Decision Regarding $1.8 Million IRS Deposit* being filed concurrent with this order,

IT IS ORDERED that the $1.8 million deposit originally held in the registry of the court to secure payment of a claim of the Internal Revenue Service in MarkAir, Inc.'s prior case,[1] plus any accrued interest, be released to the IRS within 10 days of this order becoming final and nonappealable. The trustee is granted 30 days from entry of this order to file a notice of appeal or a tolling motion.

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1. *In re MarkAir, Inc.*; *In re MarkAir Exxpress, Inc.*, A92-00476-HAR and A92-00477-HAR.

Appendix C

DATED: July 10, 2000

s/ Herbert A. Ross
HERBERT A. ROSS
U.S. Bankruptcy Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC DATED AND FILED DECEMBER 13, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-35819
D.C. No. CV-00-00206-JKS

In re: BANKRUPTCY ESTATE OF MARKAIR, INC.,

Debtor.

WILLIAM BARSTOW, III,

Appellant,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Appellee.

ORDER

Before: B. FLETCHER, ALARCON, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judges Fletcher and Alarcon have so recommended.

Appendix D

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX E — EXAMPLES OF SUCH USEAGE IN TITLE 11[1]

		such [noun]	antecedent
1.	103(d)	"such chapter"	"Chapter 7"
2.	103(g) and (h)	"such chapter"	"chapter 11"
3.	103(i)	"such chapter"	"chapter 13"
4.	103(j)	"such chapter"	"chapter 12"
5.	104(b)(3)	"such adjustments"	"adjustments made in accordance with paragraph (1)"
6.	106(a)(2) and (a)(3)	"such sections"	the sections of title 11 enumerated in § 106(a)(1)
7.	108(a)	"such period"	"a period within which the debtor may commence an action"

1. This is a partial listing of samples from Chapters 1, 3, and 5 of Title 11. Additional examples can be found in those Chapters and in Chapters 7, 9, 11, 12, and 13 of Title 11.

Appendix E

		such [noun]	**antecedent**
8.	108(b)	"such period"	"a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice or proof of claim or loss, cure a default or perform any other similar act"
9.	108(c)	"such period"	"a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title"
10.	110(b)(2), (c)(3) and (d)(2)	"such failure"	"fails to comply with paragraph (1)"
11.	110(h)(4)	"such order"	"a court order to turn over funds"

Appendix E

	such [noun]	**antecedent**
12. 301 and 302(a)	"such chapter"	"a chapter of this title"
13. 303(b)(1) and (2)	"such claims"	"a claim against such person that is not contingent as to liability or the subject of a bona fide dispute"
14. 303(g)	"such property"	"property in the possession of a trustee ordered appointed under this subsection"
15. 304(b)(1)(A)	"such property"	"property involved in such foreign proceeding"
16. 328(a)	"such terms and conditions"	"any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis"
17. 328(b)	"such attorney or accountant"	"an attorney or accountant for the estate"
18. 328(c)	"such professional person"	"a professional person employed under Section 327 or 1103 of this title . . ."

Appendix E

		such [noun]	**antecedent**
19.	329(a)	"such attorney"	"any attorney representing a debtor in a case under this title, or in connection with such a case"
20.	330(b)(1)	"such case"	"a case under Chapter 7 of this title"
21.	331	"such date"	"the date of such an application"
22.	342(b)	"such individual"	"an individual whose debts are primarily consumer debts"
23.	342(c)	"such information"	"the name, address, and taxpayer identification number of the debtor"
24.	345(a)	"such trustee"	"a trustee in a case under this title"
25.	346(c)(1)	"such case"	"a case under this title concerning a corporation or a partnership"

Appendix E

		such [noun]	**antecedent**
26.	346(e)	"such claim"	"a claim allowed under 502(f) or 503 of this title, other than a claim for a tax that is not otherwise deductible or a capital expenditure that is not otherwise deductible"
27.	346(f)	"such withheld or collected amount"	"any amount required to be withheld or collected under applicable state or local tax law"
28.	346(f)	"such tax law"	"applicable state or local tax law"
29.	346(i)(2)	"such tax attributes"	"any tax attribute to which the estate succeeded under paragraph (1) of this subsection but that was not utilized by the estate"
30.	346(i)(3)	"such order"	"the order for relief under such chapter"
31.	348(e)	"such conversion"	"conversion of a case under section 706, 1112, 1208, or 1307 of this title"
32.	349(b)(3)	"such property"	"the property of the estate"

Appendix E

		such [noun]	**antecedent**
33.	361(1) and (2)	"such stay, use, sale, lease, or grant"	"the stay under Section 362 of this title, use, sale or lease under section 363 of this title, or any grant of a lien under section 364 of this title"
34.	362(b)(3)	"such act"	"any act to perfect, or to maintain or continue the perfection of an interest in property"
35.	362(b)(16)	"such Act"	"the Higher Education Act of 1965"
36.	362(d)	"such stay"	"the stay provided under subsection (a) of this section"
37.	362(e)	"such stay"	"the stay of any act against property of the estate under subsection (a) of this section"
38.	362(e)	"such final hearing"	"the final hearing under subsection (d) of this section"
39.	362(f)	"such interest"	"the interest of an entity in property"

Appendix E

		such [noun]	**antecedent**
40.	362(g)	"such relief"	"relief from the stay of any act under subsection (a) of this section"
41.	363(b)(2)	"such section"	"section 7A of the Clayton Act"
42.	363(f)	"such entity"	"an entity other than the estate"
43.	363(f)	"such interest"	"any interest in such property of an entity other than the estate"
44.	363(f)/363(b) and (c)	"such property"	"property of the estate"
45.	363(h)	"such property"	"property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety"

Appendix E

	such [noun]	**antecedent**
46. 363(i)	"such property"	"property to which subsection (g) or (h) of this section applies, or property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case"
47. 363(j)	"such sale"	"a sale of property to which subsection (g) or (h) of this section applies"
48. 363(k)	"such sale"	"a sale under subsection (b) of this section"
49. 363(k)	"such claim"	"a lien that secures an allowed claim"
50. 363(m)	"such " authorization	"an authorization under subsection (b) or (c) of this section of a sale or lease of property"
51. 363(n)	"such sale"	"a sale under this section"
52. 363(n)	"such agreement"	"an agreement among potential bidders at such sale"

Appendix E

		such [noun]	**antecedent**
53.	363(n)	"such amount"	"any amount by which the value of the property sold exceeds the price at which such sale was consummated"
54.	363(n)	"such party"	"a party to such agreement"
55.	363(o)	"such interest"	"an interest in property"
56.	365(b)(1)	"such contract or lease"	"an executory contract or unexpired lease of the debtor"
57.	365(b)(1)	"such default"	"default in an executory contract or unexpired lease of the debtor"
58.	365(b)(1)	"such party"	"a party other than the debtor to such contract or lease"
59.	365(b)(2)	"such commencement"	"the commencement of a case under this title"
60.	365(b)(3)	"such lease"	"a lease of real property in a shopping center"
61.	365(b)(3)(c)	"such provision"	"all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision"

Appendix E

		such [noun]	**antecedent**
62.	365(c)	"such contract or lease"	"any executory contract or unexpired lease of debtor"
63.	365(c)(1)	"such party"	"a party, other than the debtor, to such contract or lease"
64.	365(d)(1) and 365(d)(2)	"such contract or lease"	"an executory contract or unexpired lease of residential real property or of personal property of the debtor"
65.	365(d)(3)	"such lease"	"any unexpired lease of nonresidential real property"
66.	365(d)(3)	"such performance"	"performance of any such obligation that arises within 60 days after the date of the order for relief"
67.	365(d)(4)	"such lease"	"an unexpired lease of nonresidential real property"
68.	365(d)(5)	"such lease"	"an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate"

Appendix E

		such [noun]	**antecedent**
69.	365(d)(9)	"such debtor"	"the debtor that is an affected air carrier"
70.	365(d)(10)	"such lease"	"an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes)"
71.	365(e)(1)	"such contract or lease"	"an executory contract or unexpired lease"
72.	365(e)(1)	"such commencement"	"the commencement of a case under this title"
73.	365(e)(2)	"such contract or lease"	"an executory contract or unexpired lease of the debtor"
74.	365(e)(2)	"such party"	"a party, other than the debtor, to such contract or lease"

Appendix E

		such [noun]	**antecedent**
75.	365(f)(3)	"such provision"	"a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease"
76.	365(g)	"such rejection"	"the rejection of an executory contract or unexpired lease of the debtor"
77.	365(h)(1)(A)	"such lease"	"an unexpired lease of real property under which the debtor is the lessor"

Appendix E

		such [noun]	**antecedent**
78.	365(h)(1)(A)(ii)	"such rights"	"rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property"
79.	365(h)(2)(A)	"such timeshare interest"	"a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller"
80.	365(i)(2)(A)	"such payments"	"all payments due under such contract"
81.	365(j)	"such party"	"a party whose executory contract to purchase real property from the debtor is rejected"
82.	365(k)	"such contract lease"	"a contract or lease or assumed under this section"

Appendix E

	such [noun]	**antecedent**
83. 365(n)(l)	"such contract"	"an executory contract under which the debtor is a licensor of a right to intellectual property"
84. 365(n)(1)(B)	"such rights"	"rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law)"
85. 501(d)	"such claim"	"a claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title"

Appendix E

	such [noun]	**antecedent**
86. 502(b)(6)	"such lease"	"a lease of real property"
87. 502(b)(7)	"such lease"	"an employment contract"
88. 502(d)	"such entity transferee"	"any entity from which or property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title"
89. 502(e)(1)	"such claim reimbursement contribution"	"any claim for for reimbursement or or contribution of an entity that is liable with the debtor on, or has secured, the claim of a creditor"
90. 502(f)	"such claim"	"a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief"

Appendix E

		such [noun]	**antecedent**
91.	502(g)	"such claim"	"A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed"
92.	502(h)	"such claim"	"A claim arising from the recovery of property under section 522, 550, or 553 of this title"
93.	502(i)	"such claim"	"A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title"
94.	502(j)	"such holder" claim"	"a holder of an allowed
95.	503(a)	"such request"	"a request for payment of an administrative expense"

Appendix E

		such [noun]	**antecedent**
96.	503(b)(1)(B)(ii)	"such adjustment"	"a tentative carryback adjustment that the estate received"
97.	503(b)(3)(E)	"such custodian"	"a custodian superseded under section 543 of this title"
98.	503(b)(3)(F)	"such committee"	"a committee appointed under section 1102 of this title"
99.	503(b)(5)	"such services"	"services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title"
100.	504(a)	"such compensation or reimbursement"	"compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title"
101.	504(b)(2)	"such creditor's attorney"	"An attorney for a creditor that files a petition under section 303 of this title"
102.	505(a)(2)	"such amount or legality"	"the amount or legality of a tax, fine, penalty, or addition to tax"

Appendix E

		such [noun]	**antecedent**
103.	505(a)(2)	"such governmental unit"	"the governmental unit from which such refund is claimed"
104.	505(b)	"such tax"	"any tax incurred during the administration of the case"
105.	505(b)	"such governmental unit"	"the governmental unit charged with responsibility for collection or determination of such tax"
106.	506(a)	"such property"	"property in which the estate has an interest"
107.	506(b)	"such claim"	"an allowed secured claim"
108.	506(c)	"such property"	"property securing an allowed secured claim"
109.	506(d)	"such claim"	"a claim against the debtor that is not an allowed secured claim"
110.	507(a)(4)	"such plan"	"an employee benefit plan"

Appendix E

		such [noun]	**antecedent**
111.	507(a)(7)	"such debt"	"debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement"
112.	507(a)(8)	"such claims"	"allowed unsecured claims of governmental units"
113.	507(a)(8)(D)	"such date"	"the date of the filing of the petition"
114.	507(b)	"such creditor"	"a holder of a claim secured by a lien on property of the debtor"
115.	507(b)	"such subsection"	"subsection (a)(1) of this section"

Appendix E

		such [noun]	**antecedent**
116.	507(c)	"such refund credit"	"an erroneous refund or or credit of a tax"
117.	508(b)	"such partner"	"a general partner that is not a debtor in a case under chapter 7 of this title"
118.	509(a) and (b)	"such entity"	"an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim"
119.	510(a)	"such agreement"	"A subordination agreement"
120.	510(b)	"such security"	"a security of the debtor or of an affiliate of the debtor"
121.	522(a)(2)	"such date"	"the date of the filing of the petition"
122.	522(d)(10)(E)	"such plan or contract"	"a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service"

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		such [noun]	**antecedent**
123.	522(e)	"such claim"	"an unsecured claim against the debtor"
124.	522(g)	"such property"	"property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title"
125.	522(l)	"such list"	"a list of property that the debtor claims as exempt under subsection (b)"
126.	523(a)(12)	"such commitment"	"any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution"
127.	523(b)	"such debt"	"a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act

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		such [noun]	**antecedent**
			in a prior case concerning the debtor under this title, or under the Bankruptcy Act"
128.	523(c)(1)	"such debt"	"a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section"
129.	523(d)	"such debt"	"a consumer debt under subsection (a)(2) of this section"
130.	524(a)	"such debt"	"any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title"
131.	524(c)	"such agreement"	"An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title"
132.	524(d)	"such agreement"	"an agreement of the kind specified in subsection (c) of this section"

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		such [noun]	**antecedent**
133.	525(a)	"such bankrupt or debtor"	"a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act"
134.	541(a)(5)	"such date"	"the date of the filing of the petition"
135.	542(b)	"such debt"	"a debt that is property of the estate and that is matured, payable on demand, or payable on order"
136.	543(a)	"such custodian"	"A custodian with knowledge of the commencement of a case under this title concerning the debtor"
137.	545	"such statutory lien"	"a statutory lien on property of the debtor"
138.	546(b)(1)	"such maintenance or continuation"	"the maintenance or continuation of perfection of an interest in property"

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		such [noun]	**antecedent**
139.	546(d)	"such producer or fisherman"	"a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) . . . a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business"
140.	546(h)	"such goods"	"goods shipped to the debtor by the creditor before the commencement of the case"
141.	547(c)(5)	"such security interest"	"a perfected security interest in inventory or a receivable or the proceeds of either"
142.	547(d)	"such surety"	"a surety that furnished a bond or other obligation to dissolve a judicial lien"

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		such [noun]	**antecedent**
143.	547(e)(1)(A)	"such transfer"	"a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property"
144.	548(a)(1)	"such transfer"	"any transfer of an interest of the debtor in property"
145.	548(c)	"such transferee or obligee"	"a transferee or obligee of such a transfer or obligation that takes for value and in good faith"
146.	549(c)	"such good faith purchaser"	"a good faith purchaser without knowledge of the commencement of the case"
148.	557(c)(1)	"such procedures"	"procedures for the determination of interests in and the disposition of grain and the proceeds of grain"
149.	557(e)	"Any such governmental unit"	"Any governmental unit that has regulatory jurisdiction over the operation or liquidation of the debtor or the debtor's business"

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	such [noun]	**antecedent**
150. 558	"any such defense"	"any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses."
151. 559	"such assets"	"assets subject to repurchase agreements"

APPENDIX F — EXAMPLES OF JUDICIAL LIENS SECURING TAX CLAIMS

See, e.g., Seattle Association of Creditmen v. American Alliance, 257 P.2d 637, 639 (Wa. 1953) (judgment entered by a court for tax liability "must be accorded the same effect as if it had been obtained in a civil action," and tax collector may "proceed by way of levy and execution as in a civil judgment *in personam* . . ."); *Garrett v. Cline*, 394 P.2d 157, 159 (Idaho 1964) (liability for unemployment taxes evidenced by judgment docketed with the clerk of the court which becomes a judicial lien on nonexempt property of the taxpayer: "Such lien may be enforced . . . in the same manner as a judgment of the district court duly docketed . . ."); *Paper Products of Laurel, Inc. v. Mississippi*, 206 S.2d 635, 637-638 (Miss. 1968) (sales tax lien effected by filing of record with clerk of circuit court: "Such judgment shall be equivalent of any enrolled judgment of a court of record and shall serve as authority for the issuance of writs of execution, writs of attachment, writs of garnishment or other remedial writs [quoting the statute] . . . The tax lien established is the equivalent of, in fact is, a judgment at law with the same rules relating to priority as any other judgment at law."); *Wheeler v. State of Oklahoma*, 665 P.2d 814, 815 (Ok. 1983) (under 1951 code of laws "a lien established through the tax warrant procedure is treated the same as a judgment rendered in a court of record and is subject to the dormancy statute . . ." There a judicial lien for taxes lapsed for failure to execute within the time limits set by law for enforcement of judgments.)

See, e.g., § 44-1-29 of the codified laws of Rhode Island (providing that for any unpaid tax or penalty the tax collector "may petition the Sixth Division of the District Court for a

writ of execution . . . If upon the hearing it shall appear that the tax or penalty is unpaid, the court shall forthwith issue an execution for the collection of the tax or penalty" including seizure and judicial sale of property); *Comptroller of the Treasury v. Washington Restaurant Group, Inc.*, 664 A.2d 899, 901 (Md. App. 1995) (Maryland tax collection statute "includes the authority to use a writ of execution to enforce a tax lien."); *Inman v. Farmer's National Company*, 783 P.2d 1328, 1330-1331 (Mt. 1990) (obligation for payment of personal property taxes may be enforced by writ of execution in the same manner as a judgment of a court of record "and with the same execution remedies as a judgment creditor."); Montana Code § 15-1-701 (tax warrant filed with state district court becomes a judgment and the tax collector becomes a judgment lien creditor: "the department may collect delinquent taxes and enforce the tax lien in the same manner as a judgment is enforced."); Pennsylvania Code of Law 72 P.S. § 8112-C (a.1) (tax lien "shall be indexed as judgments are now indexed" and may be enforced by writ of execution and by judicial sale. The lien is also subject to the requirement for renewal in the same manner as any other judgment lien.) *Goldsboro Milling Company v. Reaves*, 804 F. Supp. 762, 766 (D. N.C. 1991) (judgment for taxes is "a lien on all the real property owned by the [taxpayer] judgment debtor" in the county where the judgment is docketed, applying North Carolina law).

APPENDIX G — STATUTES INVOLVED

11 U.S.C. § 101. Definitions

In this title —

* * *

(36) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(37) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation;

* * *

(51) "security interest" means lien created by an agreement;

* * *

(53) "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;

* * * *

Appendix G

11 U.S.C. § 724. Treatment of certain liens.

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—

(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;

(2) second, to any holder of a claim of a kind specified in sections 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

* * *

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien.

Appendix G

Former 11 U.S.C. § 107c(3)
[Chandler Act § 67c(3) as amended in 1966].

Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived form the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien. PL 89-495; 80 Stat. 268 § 4.

(2)

Supreme Court, U.S.
FILED

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No. 02-1355

In the Supreme Court of the United States

WILLIAM BARSTOW, III, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether 11 U.S.C. 724(b), which allows property subject to a tax lien to be distributed first to priority creditors, applies to property encumbered by a lien that attached pursuant to a judicially-sanctioned agreement that allowed the property to be used in the debtor's reorganization.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 308 F.3d 1038. The opinion of the district court (Pet. App. 21a-37a) is reported at 272 B.R. 710. The opinion of the bankruptcy court (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2002. A petition for rehearing was denied on December 13, 2002. Pet. App. 42a-43a. The petition for a writ of certiorari was filed on March 12, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1992, MarkAir, Inc., filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Pet. App. 2a. When it filed the reorganization petition, MarkAir was liable for a substantial amount of unpaid federal excise taxes. *Ibid.* After the bankruptcy case was commenced, however, MarkAir applied for a refund of approximately $3.1 million of other taxes that it claimed to have overpaid. *Id.* at 3a. The company petitioned the bankruptcy court for authority to use that refund to secure obligations it owed to Airline Reporting Corporation (ARC), a ticket clearinghouse whose services were essential to MarkAir's continued operations. ARC had threatened to stop providing services to MarkAir unless the company posted a letter of credit in the amount of $1.8 million. *Ibid.*

To facilitate the continuing operation of MarkAir, an agreement was entered into by ARC, MarkAir, MarkAir's parent corporation (Alaska International Industries, Inc. (AII)), and the Internal Revenue Service concerning the refund claimed by MarkAir. Pet. App. 3a. Pursuant to that agreement, (i) the IRS agreed to forego its right to offset the $3.1 million refund against other taxes owed by MarkAir and (ii) MarkAir agreed to release $1.8 million of the refund to the bankruptcy court to serve as collateral to secure ARC's continued performance while (iii) MarkAir further agreed that $1.3 million of the claimed refund would be retained by the IRS and that any portion of the $1.8 million used as collateral would be returned to the IRS upon termination of the interim operating agreement with ARC. *Ibid.*

Under the terms of this agreement, ARC was granted a "first judicial lien" and the IRS was granted a

"second place judicial lien" in the $1.8 million collateral amount. Pet. App. 3a. The bankruptcy court issued an order approving the agreement. *Ibid.*

2. MarkAir failed to complete its confirmed plan of reorganization and subsequently filed a second Chapter 11 petition, which was thereafter converted to a Chapter 7 liquidation. Pet. App. 4a. ARC's claims were paid off shortly after the conversion to the Chapter 7 proceeding. *Ibid.* The IRS then applied to recover the $1.8 million collateral deposit pursuant to the terms of the collateral agreement. *Ibid.*

Petitioner, who is the trustee in MarkAir's liquidation proceeding, opposed the government's motion. Petitioner claimed that the judicial lien obtained by the IRS through the consent of the parties should be subordinated to the claims of other creditors under 11 U.S.C. 724(b). That statute allows property "subject to a lien * * * that secures an allowed claim for a tax" to be used to pay other creditors in specified situations. See 11 U.S.C. 724(b)(1)-(6).

The bankruptcy court rejected petitioner's claim. Pet. App. 38a-39a. The court explained that the text of this statute makes clear that Section 724(b) applies only to statutorily-created "tax liens" and does not apply to judicial liens that are created under collateral agreements authorized by the court to facilitate continued operations of the debtor. *Id.* at 39a.

3. The district court affirmed. Pet. App. 21a-37a. The court noted that Section 724(b) expressly applies to a "tax lien," which is a term generally understood to refer to a lien created by statute that arises automatically upon the nonpayment of taxes. *Id.* at 31a-34a. Looking at the language of Section 724 "as whole," the court concluded that "the lien described in § 724(b) is a statutory tax lien." Pet. App. 33a. The court pointed

out that the legislative history of the statute also "makes it evident that 11 U.S.C. § 724(b) specifically applies to statutory tax liens." Pet. App. 37a.

4. The court of appeals affirmed. Pet. App. 1a-20a. The court concluded that Section 724(b) provides for subordination of tax liens created by statute and does not apply to consensual liens approved by the bankruptcy court in the circumstances of this case. In reaching that conclusion, the court noted that the statutory phrase "lien that secures an allowed claim for [a] tax" could be read to apply "to any kind of lien that secures an allowed claim for [a] tax," whether a statutory or judicial or consensual lien. Pet. App. 7a. The court pointed out, however, that the statute also expressly refers to "tax liens," which is a "term [that] does, in general, refer to statutory tax liens." *Id.* at 8a. The court stated that "Congress' frequent use of the term 'tax lien' in § 724(b) interjects ambiguity" in the statute. Pet. App. 7a.

The court then reviewed the legislative history of Section 724(b) and agreed with the district court that it "supports the IRS's interpretation of the statute." Pet. App. 12a. The court noted that Section 724(b) is a successor to Section 67c of the Chandler Act, which had subordinated only statutory tax liens on personal property and had no effect on judicial liens or contractual liens. Pet. App. 12a-14a. The court explained that the legislative history of Section 724(b) establishes that the new statute was "derived" from Section 67c(3) "without substantial modification in result." Pet. App. 14a (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 382 (1977)).

The court also concluded that the government's interpretation of Section 724(b) was "more consonant with the overall bankruptcy scheme." Pet. App. 18a. Under

petitioner's reading of the statute, the refund provided by the IRS became subject to Section 724(b) only when it was paid into court and became subject to the consensually-created judicial lien. Pet. App. 19a. Petitioner's interpretation of Section 724(b) would "discourage taxing authorities from releasing any funds that otherwise could be used to resurrect a failing company" and would thereby impede an essential goal of the bankruptcy process. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the question addressed in this case—whether a judicial lien constitutes a "tax lien" within the meaning of Section 724(b) of the Bankruptcy Code—has not been addressed by any other appellate court. Further review is therefore not warranted.

1. In the liquidation of a Chapter 7 estate, Section 724(b) of the Bankruptcy Code subordinates a "tax lien" to the claims of other creditors holding priority claims. 11 U.S.C. 724(b). The subordination of tax liens to priority claimants has long been part of the distribution scheme in liquidation cases under the federal bankruptcy laws. The rule first appeared in Section 67c of the Chandler Act, ch. 575, 52 Stat. 877. Section 67c specified that "statutory liens, including liens for taxes," in personal property were subordinated to the claims of priority claimants. See *Goggin* v. *Division of Labor Law Enforcement of California*, 336 U.S. 118, 119 n.1 (1949). Section 67c was revised in 1966 (and renumbered as Section 67c(3)) specifically to authorize subordination of a "tax lien on personal property not accompanied by possession." Pub. L. No. 89-495, 80

Stat. 269. In making that revision, Congress expressly noted that the term "tax lien" refers only to *statutory* tax liens. S. Rep. No. 1159, 89th Cong., 2d Sess. 6, 8 (1966) ("new section 67c establishes more effective standards for the treatment of statutory liens"). These 1966 revisions made clear that the subordination authorized by the statute was "limited to statutory liens and does not include consensual liens." *Id.* at 6.

When Congress again revised the bankruptcy laws in 1978, the rule of Section 67c(3) was recodified as Section 724(b) of the Bankruptcy Code. Unlike its predecessor, the new Section 724(b) authorizes subordination of tax liens in real, as well as personal, property. No other change was made to the statute. As the 1978 legislative history emphasizes, Section 724(b) was "derived from section 67(c)(3) of the Bankruptcy Act, without substantial modification in result." H.R. Rep. No. 595, 95th Cong., 1st Sess. 382 (1977).

In similar contexts, courts have properly been "reluctant to accept arguments that would interpret the [Bankruptcy] Code * * * to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992). If Congress had intended to broaden the term "tax lien" to include nonstatutory judicial liens and contractual liens, it presumably would have said so. See *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990) ("[w]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure").

Petitioner nonetheless contends that, in enacting Section 724(b) in 1978, Congress intended to broaden the term "tax lien" by referring, in the opening phrase of Section 724(b), to a "lien * * * that secures an

allowed claim for a tax." 11 U.S.C. 724(b). Nothing in that language, however, provides support for a claim that Congress intended to overhaul the accepted understanding on which the statute was enacted—that the "tax lien" that is subordinated to the claims of priority creditors is a statutory lien and not one created by consent or court order. As the court of appeals correctly recognized (Pet. App. 7a), the term "tax lien" appears seven times in Section 724(b) and that term plainly refers to the lien for taxes that is imposed by statute and that arises by operation of law in "all property and rights to property" of the taxpayer whenever taxes are not timely paid (26 U.S.C. 6321).[1] Other courts have consistently reached this same conclusion in related contexts under the bankruptcy laws, in holding that the term "tax lien" refers only to a statutory lien for taxes that arises by operation of law when the tax liability goes unpaid. *In re Khoe*, 255 B.R. 581, 588 (Bankr. E.D. Cal. 2000); *Filipovits* v. *IRS*, 76 A.F.T.R.2d (RIA) ¶ 95-5501 (Bankr. D. Md. 1995); *In re Wiles*, 173 B.R. 92 (Bankr. M.D. Pa. 1994); *In re*

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[1] Petitioner errs in contending that the court's reading of Section 724(b) improperly ignores the fact that the term "tax lien" is invariably preceded in the statute by the modifier "such." Petitioner claims (Pet. 14) that the court failed to recognize that the word "such" ties the term "tax lien" to the preceding phrase "lien * * * that secures an allowed claim for a tax," thus making the two phrases mean the same thing. The court of appeals did not ignore the word "such" in Section 724(b). Instead, the court correctly concluded that the word "will not bear so much weight" as petitioner would assign to it. Pet. App. 11a. As discussed in the text above, there is no indication that Congress intended the phrase "lien * * * that secures an allowed claim for a tax" to mean anything different than a "tax lien."

Carolina Resort Motels, Inc., 51 B.R. 447, 450 (Bankr. D.S.C. 1985).[2]

The decision of the court of appeals is consistent with the accepted understanding of the term "tax lien" and with the manner in which that term has been applied in the bankruptcy laws. Neither the text of the statute nor the legislative history indicates that Congress intended to adopt some different understanding of the term "tax lien" in Section 724(b).

2. Petitioner errs in asserting (Pet. 20) that a conflict exists between the decision in this case and the decision in *In re K.C. Machine & Tool Co.*, 816 F.2d 238 (6th Cir. 1987). The question addressed in *K.C. Machine* is unrelated to the one presented here. In *K.C. Machine*, property in a bankruptcy estate was subject to both a private security interest and a municipal tax lien. The municipal lienholder argued that the property should be abandoned to the creditors under 11 U.S.C. 554(b) because it was fully encumbered and thus had inconsequential value to the estate.[3] The trustee, however, argued that the property remained beneficial to the estate because, if it were sold by the estate, the proceeds of the sale would be distributed under Section 724(b) and thereby provide administrative claimants

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[2] Section 724(d) of the Bankruptcy Code provides additional support for this conclusion. That Section specifies that "[a] statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien." 11 U.S.C. 724(d).

[3] Section 554(b) of the Bankruptcy Code provides that "[o]n request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. 554(b).

with a means of recovery on their claims. The Sixth Circuit agreed with the trustee that subordination of a tax lien to the claims of administrative claimants under Section 724(b) would confer a benefit on the estate and that the bankruptcy court had thus erred in ordering the property to be abandoned. 816 F.2d at 247. That holding does not conflict in any manner with the decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003